

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

RC PETITION

Case No.
16-RC-304654

Date Filed
10/4/2022

INSTRUCTIONS: Unless e-Filed using the Agency's website, www.nlrb.gov/, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.

1. PURPOSE OF THIS PETITION: RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. **The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.**

2a. Name of Employer SAY Si (San Antonio Youth Yes)		2b. Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code) 1310 S. Brazos St. TX San Antonio 78207	
3a. Employer Representative - Name and Title Jason Moran		3b. Address (If same as 2b - state same) 1310 S. Brazos St. TX San Antonio 78207	
3c. Tel. No. (210) 685-1906	3d. Cell No. (210) 685-1906	3e. Fax No.	3f. E-Mail Address jsn.moran10@gmail.com
4a. Type of Establishment (Factory, mine, wholesaler, etc.) Others		4b. Principal product or service You h Arts Education & Development	
5a. City and State where unit is located: San Antonio, TX			5b. Description of Unit Involved
Included:			6a. No. of Employees in Unit: 29
Excluded:			6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes [<input checked="" type="radio"/>] No [<input type="radio"/>]

Check One: ☒ **7a.** Request for recognition as Bargaining Representative was made on (Date) 9/19/2022 and Employer declined recognition on or about 10/3/2022 (Date) (If no reply received, so state). Yes
☐ **7b.** Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8a. Name of Recognized or Certified Bargaining Agent (If none, so state).		8b. Address	
8c. Tel No.	8d Cell No.	8e. Fax No.	8f. E-Mail Address
8g. Affiliation, if any		8h. Date of Recognition or Certification	8i. Expiration Date of Current or Most Recent Contract, if any (Month, Day, Year)

9. Is there now a strike or picketing at the Employer's establishment(s) involved? No If so, approximately how many employees are participating? _____
(Name of labor organization) _____, has picketed the Employer since (Month, Day, Year) _____.


10. Organizations or individuals other than Petitioner and those named in items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. (If none, so state)

10a. Name		10b. Address		10c. Tel. No.		10d. Cell No.	
				10e. Fax No.		10f. E-Mail Address	
11. Election Details: If the NLRB conducts an election in this matter, state your position with respect to any such election.				11a. Election Type: ___ Manual ___ Mail <input checked="" type="radio"/> Mixed Manual/Mail			
11b. Election Date(s): 10/10/2022-10/24/2022		11c. Election Time(s): 10am-6pm		11d. Election Location(s): At the entrance of the main location opposite the kitchen, 1310 S Brazos			
12a. Full Name of Petitioner (including local name and number) Jacob Simon Aronowitz United Professional Organizers				12b. Address (street and number, city, state, and ZIP code) 4703 Pecan Springs Unit A TX Austin 78723			
12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (if none, so state) TX							
12d. Tel No. (713) 906-6224		12e. Cell No. (713) 906-6224		12f. Fax No.		12g. E-Mail Address info@upounion.org	

13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.

13a. Name and Title		13b. Address (street and number, city, state, and ZIP code)	
13c. Tel No.	13d. Cell No.	13e. Fax No.	13f. E-Mail Address

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print) Jacob Simon Aronowitz	Signature 	Title Business Committee Member	Date 10/03/2022 09:55:17 PM
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WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information may cause the NLRB to decline to invoke its processes.

Please fill all necessary fields on the form PRIOR to digitally signing. To make changes after the form has been signed, right-click on the signature field and click "clear signature." Once complete, please sign the form.

DO NOT WRITE IN THIS SPACE	
Case 16-RC-3004654	Date Filed 10/4/2022

Employees Included

All Teaching Artists, ABC Instructors, Program Directors, Instructors, Studio Assistants, Mentors, Woodshop Technicians, and all Administrative Support Staff, including Operations Managers, Development Directors, Data and Development Associates, Marketing Specialists, Administrative Assistants to Programs and other intermediary assistant or coordinator roles without direct hiring, firing, and/or budget-implementing powers that might be created in the future employed by SAY Sí in the State of Texas.

Employees Excluded

All other employees, including office clerical employees, professional employees, guards, and supervisors as defined by the Act.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

CASE 16-RC-304654

SAY SÍ,

Employer,

and

UNITED PROFESSIONAL ORGANIZERS,

Petitioner.

POST-HEARING BRIEF OF SAY SÍ

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POST-HEARING BRIEF FOR SAY SI¹

SAY Sí (or “the Employer”), through the undersigned counsel, files this Post-Hearing Brief.

¹ The Employer moves to correct the transcript in the following respects:

- p. 38, line 6: “person on files” should be “personnel files.”
- p. 43, lines 19-20: “White Police Manual” should be “Policy Manual.”
- p. 43, line 24: “West side” should be “website.”
- p. 47, line 3: “drafter” should be “director.”
- p. 47, line 23: “West side” should be “website.”
- p. 48, line 4: “costumers” should be “costumes.”
- p. 53, line 20: “no way” should be “no one.”
- p. 66, line 8: “design” should be “zine.”
- p. 66, lines 11 and 22: “sound back” should be “sound bath.”
- p. 67, line 7: “sound app” should be “sound bath.”
- p. 121, line 16: “Maria” should be “Mary Ann.”
- p. 136, line 25: “to” should be “by.”
- p. 137, line 14: “Actual” should be “Ashley.”
- p. 182, line 1: “vehicle used in transportation” should be “Vehicle Use and Transportation.”
- p. 190, line 6: “I did” should be “Javier did.”
- p. 190, line 8: “I did” should be “Javier did.”
- p. 190, line 10: “I did” should be “Javier did.”
- p. 190, line 13: “I did” should be “Javier did.”
- p. 215, line 15: “talking” should be “checking.”
- p. 411, lines 7, 8, and p. 412, lines 1, 6: “vertiscope” should be “rotoscope.”
- p. 412, line 14: “y stents,” should be “students.”
- p. 470, line 11: “amounts” should be “accounts.”
- p. 492, line 22-23: “employees and HIVES own” should be “employees in HIVE.”
- p. 596, line 4: “can’t” should be “can.”
- p. 596, line 6: “hear” should be “hearing.”
- p. 675, line 21: “epidemic” should be “academic.”
- p. 721, line 25: “Stephen” should be “Stevan.”
- p. 860, line 24: “perceive” should be “foresee.”
- p. 861, line 17: “perceive” should be “foresee.”
- p. 887, line 17: “are removed entirely” should be “are not removed entirely.”
- p. 951, line 13: “deputative” should be “putative.”
- p. 953, line 1: “punitive” should be “putative.”
- p. 958, line 4, 8, and 22: “Stevan” should be “Stephen.”
- p. 969, line 11: “Stevan” should be “Stephen.”
- p. 970, line 14: “Stevan” should be “Stephen.”
- p. 970, line 20: “Stevan” should be “Stephen.”
- p. 972, line 9: “Stevan” should be “Stephen.”

I. STATEMENT OF CASE²

On or about October 4, 2022, United Professional Organizers (“the Union” or “Petitioner”) filed a representation petition seeking certification as the collective bargaining representative in the following unit at SAY Sí:

All Teaching Artists, ABC Instructors, Program Directors, Instructors, Studio Assistants, Mentors, Woodshop Technicians, and all Administrative Support Staff, including Operations Managers, Development Directors, Data and Development Associates, Marketing Specialists, Administrative Assistants to Programs and other intermediary assistant or coordinator roles without direct hiring, firing, and/or budget-implementing powers that might be created in the future employed by SAY Sí in the State of Texas, excluding all other employees, including office clerical employees, professional employees, guards and supervisors as defined by the Act.

In Petitioner’s Responsive Statement of Position, Petitioner stated that its “presently sought unit” was:

All full-time and regular part-time development directors, ABC instructors, administrative assistants to programs, operations managers, marketing assistants, media arts directors, new media directors, theatre arts directors, visual arts directors, WAM mentors, theatre arts studio assistants, new media studio assistants, media arts studio assistants, visual arts studio assistants, theatre arts instructors, new media instructors, media arts instructors, and visual arts instructors employed by the Employer at its facility currently located at 1310 South Brazos Street, San Antonio, Texas. (Bd. Ex. 1(f)).

Petitioner failed to amend its Petition to conform with the sought unit.

At hearing, the parties stipulated that any unit found appropriate by the Regional Director should include:

All full-time and regular part-time data and development associates, ABC instructors, program administrative assistants, marketing assistants, theatre arts studio assistants, new media studio assistants, media arts studio assistants, visual arts studio assistant, theatre instructors, new media instructors, media arts instructors, and visual arts instructors employed by

² References to the hearing transcript will be referred to as “Tr.,” followed by the appropriate page number(s). References to exhibits introduced into evidence at the hearing are designated by the exhibit number, preceded by “Bd. EX” for the Board’s exhibits, “U EX” for the Union’s exhibits, and “ER EX” for the Employer’s exhibits.

the Employer at its facility currently located at 1310 South Brazos Street, San Antonio, Texas, but excluding all other employees, office clerical employees, professional employees, confidential employees, managerial employees, guards, and supervisors as defined in the Act. (Bd. Ex. 2).

SAY Sí disputes the inclusion in the unit of clear supervisory and managerial employees, as well as confidential employees. Specifically, the evidence adduced at hearing established that the Media Arts Director (also called the “MAS Studio Director”), Theatre Arts Director (also called the “ALAS Studio Director”), New Media Studio Director (also called the “HIVE Studio Director”), the Visual Arts Director (collectively “the Studio Directors”), Operations Manager, and Development Director all possess and exercise supervisory and managerial authority. With regard to the Operations Manager, in the event the overwhelming record evidence would be ignored and she³ would not be found to be a supervisor within the meaning of Section 2(11) of the National Labor Relations Act (“NLRA” or “the Act”) or a manager excluded pursuant to Board policy, the evidence would alternatively establish that she is a confidential employee within the meaning of Board policy, and would, thus, need to be excluded.

This is a very unusual case. Petitioner argues that there are zero (0) supervisory or managerial individuals currently employed at SAY Sí. When fully staffed, Petitioner argues that there is only one (1) supervisory and managerial employee at all of SAY Sí – the Executive Director, or during the period when the Executive Director position was shared by two people, the co-Executive Directors. The Studio Directors and Operations Manager who testified on behalf of Petitioner at hearing attempted to shoehorn themselves through their conclusionary testimony outside of the statutory exclusion set forth in Section 2(11) of the Act and the managerial exclusion. However, more reliable testimony and the documents that the Employer was able to obtain through

³ Pronouns are used herein in accordance with how they are believed to be known or were expressed at hearing.

considerable effort under the unique circumstances present here⁴ paint the true story: the Studio Directors,⁵ Operations Manager, and Development Director (collectively “the Supervisors/Managers”) possess and exercise statutory indicia set forth in Section 2(11) of the Act, establishing them as statutory supervisors, and possess managerial authority excluding them from the Act. In addition, although the Employer is confident that the evidence overwhelmingly establishes the Operations Manager’s supervisory and managerial status, alternatively, she would need to be excluded from any unit found appropriate by the Regional Director as a confidential employee.

The Supervisors/Managers, using independent judgment in the interest of the Employer:

- hire and effectively recommend hire,
- effectively recommend reward and termination through their participation in the evaluation process,
- possess the authority to discipline,
- assign work and effectively recommend assignment of work,
- responsibly direct work, and
- adjust grievances.

In addition, the Supervisors/Managers are responsible for formulating and implementing policy which they exercise in the interest of the Employer, and they possess independent discretion in developing their respective studios’ curricula and external projects. The Supervisors/Managers have discretion in budgeting, scope of work as it relates to studio and external projects, and purchasing. Although the record is replete with evidence of the Supervisors/Managers possessing

⁴ In order to obtain personnel files and other relevant employment documents, it was necessary for the Employer to subpoena these documents from the Operations Manager, who Petitioner is seeking to include in the unit. (ER EX 68).

⁵ Also referred to as “Program Directors.” (ER EX 98; Tr. 845).

and exercising supervisory and managerial authority throughout their tenure of employment at SAY Sí, since October 7, they run day-to-day operations, with no one of higher rank on the premises. Despite protests to the contrary, the Supervisors/Managers are able to run SAY Sí since October 7 because they are continuing to do what they always have done—supervise and manage. While Petitioner’s witnesses spouted a well-rehearsed narrative⁶ of decisions by collaboration, this does not mean no one is in charge. The weight of record evidence shows clearly who is in charge—the Studio Directors, the Operations Manager, and the Development Director with oversight from the volunteer Board of Directors, which is not present on a daily basis and is not involved in personnel matters.

In addition, Working Artists and Mentors (“WAM Mentors”) are not properly included in the unit. They are temporary employees in a program limited to high school employees. Petitioner presented an example, unknown to the Employer prior to hearing, of an individual who was permitted to stay on as a WAM Mentor, despite graduating from the program and in contradiction to the established intent of the program.⁷ Further, the WAM mentors are irregular part-time employees, and, thus, do not meet the definition of “regular part-time employees.”

Although precluded from litigation at a pre-election representation hearing, as raised with the Region prior to the hearing, there is overwhelming evidence of supervisory taint with respect to the instant petition. Due to the admitted involvement of the Supervisors/Managers with regard

⁶ It should also be noted that the Hearing Officer failed to give instruction to witnesses on the stand that they were not to converse with others during breaks while they were on the stand, including their advocate, regarding their testimony, despite the Employer’s counsel’s repeated requests that she do so. (Tr. 305-306, 349, 482, 564). Moreover, the Hearing Officer expressly stated that “during breaks by all means everyone is free to do what they wish” with regard to viewing their phones and texting, thereby compromising the testimony of Petitioner’s witnesses. (Tr. 261).

⁷ As explained below, to the extent the Studio Directors have changed the intent of the WAM Mentor program and are now allowing non-high school students to remain on in mentor roles, this only bolsters the fact that they are managers. However, no evidence was adduced at hearing that the Studio Directors changed the WAM Mentor program to extend beyond high school.

to the instant petition, Respondent avers that the dismissal of the instant petition is compelled.

II. STATEMENT OF FACTS

A. Background and Organizational Structure

SAY Sí is a tuition-free middle school and high school after-school arts program, where students can develop their leadership and artistic skills, and prepare for college. (Tr. 42-43). SAY Sí operates four studios: 1) the Media Arts Studio (“MAS”), 2) the Home for Innovation and Video Ecology (“HIVE”) or New Media Studio, 3) the Activating Leadership, Art, and Service (“ALAS”) Theatre Arts Studio, and 4) the Visual Arts Studio. (ER EX 1).

The MAS Studio is a film, photography, and digital art based program that focuses on storytelling through digital media. Students learn video production, digital and analog photography, animation, and digital arts. Once their digital content is completed, the students design the accompanying promotional and marketing materials for exhibits, film festivals, and movie premieres. In addition, the MAS Studio produces digital works for companies, organizations, and individuals outside of SAY Sí. (ER EX 2; Tr. 45). The MAS Studio is headed by Media Arts Director Guillermina Zabala (“Zabala”), who designs the curriculum. (Tr. 45; 59, 157, 495). Reporting to Zabala are Media Arts Teaching Artist Alex Rameriz, and an ABC Instructor, Reese Lundquist (“Lundquist”), who is temporarily performing WAM Mentor duties while they await the start of a new assignment. (Tr. 530). At other times, a studio assistant reported to Zabala. (Tr. 530).

The HIVE New Media Arts studio conducts a program through which students produce digital and tech-based work, tie visual art and narrative together, consider interactivity as a feature of art, and explore new art forms. (ER EX 3). The studio is headed by New Media Arts Director Stevan Zivadinovic (“Zivadinovic”), who designs and oversees the curriculum. (Tr. 46; 59).

Students make digital paintings and illustrations, draw comics and animations, write interactive fiction, program video games and procedural art. They design books, card games, and board games. (ER EX 3). In addition, they gain experience with augmented reality, digital devices, and sound art. (ER EX 1). Students' work culminates in a capstone project that hones practical trade skills through participation at conventions and fests. (ER EX 1). Reporting to Zivadinovic are New Media Studio Assistant Emmanuelle Maher and New Media Instructor Miguel Salazar (Tr. 73).

The Theatre Arts program is housed in the ALAS Studio, headed by Theatre Arts Director Amalia Ortiz ("Ortiz"), who designs and oversees the curriculum. (Tr. 49, 59, 168). ALAS operates the ALAS Youth Theatre Company. In the ALAS Studio, students develop their skills in acting, directing, playwriting movement, spoke word, voice, technical theatre, and stage management culminating in public performance. (ER EX 5; Tr. 47-48). Reporting to Ortiz are Theatre Arts Studio Assistants Katie Hughes and Solstiz Ibarra Campos. (ER EX 10).

The Visual Arts Studio is headed by Visual Arts Director Ashley Perez ("Perez"), who designs and oversees the curriculum. (Tr. 49, 59, 131, 350). Through project-based learning, students explore a variety of mediums, including drawing, painting, sculpture, ceramics, and installation art. The studio has four to six themed exhibits a year, with completed student work displayed in a gallery open to the public. In addition, students receive opportunities to exhibit artwork in other community spaces, arranged by Perez. (ER EX 6; Tr. 49). Reporting to Perez is Teaching Artist Michael Foerster. (ER EX 10).

In addition to the above listed employees, WAM Mentors report to each of the Studio Directors. (ER EX 7 and 8). A WAM mentor is a high school junior or senior who helps teach, advise, and guide middle school students through their artistic work. (ER EX 17; Tr. 185).

The Studio Directors are overseen by an Executive Director. There are no other supervisors in the studios other than the Studio Directors. (Tr. 62-63). The undisputed testimony established that the Studio Directors have equivalent authority amongst each other. (Tr. 65). The Executive Director reports to a Board of Directors, comprised of community volunteers. (ER EX 7 and 8; Tr. 60). There were two co-Executive Directors sharing the role from August 2021 (Tr. 313) to August 8, 2022, when they resigned. (Tr. 958). Thereafter, the Board of Directors made the decision in August 2022 to only have one Executive Director going forward. The Executive Director position has remained vacant since August 8, 2022,⁸ however, Mary Ann Beach (“Beach”) was contracted by the Board of Directors’ Executive Committee to serve as Interim Executive Director for a period of 60 days—August 10 through October 7. (Tr. 1020). Since October 7, there has been no Interim Executive Director role, and the Executive Director position remains vacant. When the Executive Director position it is occupied, it is the highest ranking position at the Employer. (ER EX 7; ER EX 8). Since October 7, the Studio Directors, the Operations Manager, and Development Director are the highest ranking individuals at the Employer.⁹ (Tr. 61, 62). Currently the Executive Director position is posted. (ER EX 119).

Until about December 2021, the position of Program Coordinator, also called Program Director, existed. When the position existed, the Studio Directors reported to the Program Director.¹⁰ This position was eliminated prior to Beach becoming Interim Executive Director and replaced by the Program Administrative Assistant.¹¹ (Tr. 53-54). When the Program Director

⁸ All dates refer to 2022 unless otherwise specified.

⁹ The Employer also has a President and Director of Innovation who works remotely and is responsible for a capital campaign that SAY Sí is undergoing and for the next phases of building construction. No employees report to this position and the position does not come onto campus on a regular basis. (Tr. 56-57).

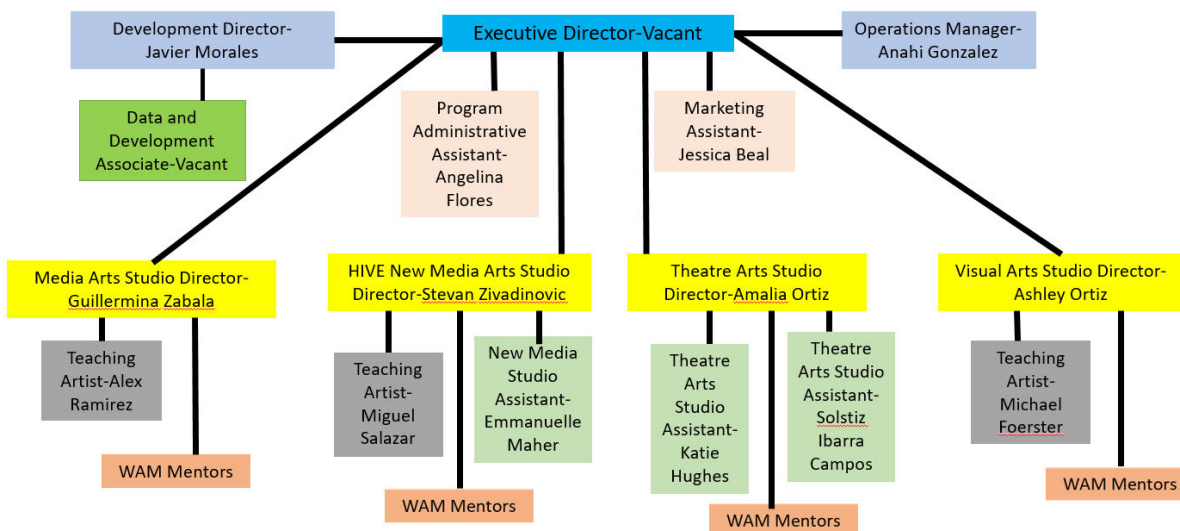
¹⁰ Nicole Amri held this role of Program Director prior to becoming co-Executive Director, followed by Cassidy Fritts. (U EX 13, ER EX 8; Tr. 55, 1042).

¹¹ Angelina Flores was hired into the Program Administrative Assistant position in about March 2022. (ER EX 10; ER EX 53).

position was eliminated, the Studio Directors began reporting directly to the Executive Director. The Program Administrative Assistant has no direct reports or supervisory authority. (Bd. Ex. 2; ER EX 7; Tr. 55-56).

In the organizational hierarchy, both the Operations Manager and the Development Director are peers to the Studio Directors. (Tr. 61, 62). Both the Operations Manager and the Development Director report to the Executive Director. (Tr. 62).

The Operations Manager, Anahi Gonzalez (“Gonzalez”),¹² reports to the Executive Director, and has no direct reports. The Development Director, Javier Morales, is a newly created position, replacing the Development Manager position in 2021. (ER EX 10; Tr. 58). The Development Director reports to the Executive Director. Reporting to the Development Director is the Data and Development Associate, which is currently a vacant position. The current structure is thus:



The physical location of SAY Sí is 1310 S. Brazos St, San Antonio, Texas. Upon entry

¹² Gonzalez also appears in some of the exhibits as Anahi Vallejo. (See, e.g., U EX 13; ER EX 62; Tr. 322, 473).

into the building is a central space which serves as a gallery space. (Tr. 50). There is an additional separate gallery called the Flex studio. At the back of the gallery area, there are the four separate studios. Each studio has its own separate space, with its own equipment, show space, and working space for students. (Tr. 50). Each Studio Director has their own desk within their respective studio. (Tr. 51).

The administrative staff is located in an open concept office area, where the Development Director, Operations Manager, Programming Administrative Assistant, and Marketing Assistant work. (Tr. 50-51). A wall separates the Executive Director's space and the Administrative area.

B. Operations Manager's Job Duties

The Operations Manager effectuates Human Resources for the organization and is the only Human Resources contact for employees. (ER EX 43b; Tr. 181). Gonzalez handles job offers, staff evaluations and assessments, employee compensation packages, promotions, and grievances. (Tr. 727). In 2021, the Operations Manager conducted a self-assessment that described some of the work she performed in her role. (ER EX 43a, ER EX 43b). In her self-assessment, she stated that "[w]hile one of my principal responsibilities is to 'maintain records and files for HR/staff, insurance and expenditures I know that I do far more than that.'" With regard to Human Resources, she stated, "not only do I maintain up to date records for all employee files, but am the main point of contact for HR related questions from staff. My job description lists this as a minimal task, but it continues to be an area needing considerable time and effort."

In addition, she stated that, "in assessing the current payroll administration processes and the clear need for HR support," she "defined and analyzed our needs as an organization." This included "identifying vendor candidates, developing evaluation criteria conducting vendor interviews and briefings, scheduling demos, contacting references and presenting findings to

leadership.” Gonzalez “found the best solution for a Professional Employee[r] Organization.” (ER EX 43b). The organization adopted her recommendation and partnered with Insperity. (ER EX 83, Tr. 844).

According to Gonzalez, she not only maintains insurance records and files, but informs leadership of the appropriate insurance coverage needed and guarantees that appropriate coverages are set in place. (ER EX 43b). She negotiates insurance coverage for the organization, including employee medical insurance, Workers’ compensation insurance, and unemployment insurance. (Tr. 175-176). The record shows that Gonzalez is the point person for negotiating employee medical and dental insurance options. She obtains proposals, requests revised quotes, and communicates the decision to renew. (ER EX 91, ER EX 99). She communicates insurance requirements for Visiting Artists to the Studio Directors. (ER EX 80).

According to Gonzalez, she requested additional proposals from the Employer’s benefits broker for medical benefit plans upon renewal, performed a cost analysis and presented the most cost effective and reasonable options to leadership, which resulted in changing medical plan carriers. (ER EX 43b). She worked with Toubin Insurance to move all policies to their book of business and was tasked with finding a new insurance agent. She “single handedly” conducted the vendor selection process for a new CPA firm and a Professional Employer Organization (Payroll & HR), conducting interviews, compiling information, collecting proposals, comparing and analyzing costs, contacting references, presenting to the leadership team, and “ultimately finding the best candidate for our organization.” (ER EX 43b). She “collaborated with BenefitMail to get the most cost effective medical benefits plan option with the best co-pay resulting in an overall annual savings.” (ER EX 43b). She “underwent a fully mobile audit with our new CPA firm with little to no support-with audit being completed in record time.” (ER EX 43b).

Gonzalez handles unemployment for the Employer. (Tr. 176). She took unemployment claims for furloughed employees and was the liaison between the Texas Workers Commission and SAY Sí. (Tr. 176).

While there are few examples of the circumstances regarding employee separations in the record, Gonzalez was involved in discussions with then-Executive Director, Program Director, and Communications Director¹³ in how to end the employment of employee Hirrah Barlas and the impact of the options with respect to unemployment implications. (ER EX 61). The Executive Directors also obtained Gonzalez's input on what was needed to end the employee's employment with SAY Sí and sought input from her for creating a process for employment separation. (ER EX 92).

Gonzalez made suggestions which were implemented so that certain ABC instructors could be paid bi-weekly rather than monthly and their hours could be tracked and differentiated. (ER EX 75; Tr. 822). She gave input into the Data and Development job description which was implemented. (ER EX 77). Once the Employer contracted with Insperity, she provided feedback on its implementation, ensuring employee leave rules were correctly reflected in the timekeeping portion of the system. (ER EX 83; Tr. 844). She also exercised her authority to change the payroll system and the approval process to enable Studio Directors, "as [WAM] Mentors' managing supervisor[s]," to approve WAM Mentors' timecards before she reviews and processes their payroll. (ER EX 98).

Gonzalez participated in the consideration of pay increases with the then-co-Executive Directors. (ER EX 86). Pursuant to these discussions, she calculated pay, tax expenses, and the cost of potential increases. (ER EX 86, ER EX 87). She is made aware of pay increases and

¹³ The Program Director and Communications Director positions no longer exist. (ER EX 7, ER EX 8; Tr. 53-54).

adjustments before employees know, and informs employees that they are granted. (ER EX 88; Tr. 850). Gonzalez effectuates raises and is included on documentation of employee performance evaluations. (ER EX 51, ER EX 52). In addition, she is able to independently resolve grievances such as employee pay issues. (ER EX 52; Tr. 798). For example, when Michael Foerster believed he did not receive his pay increase, Gonzalez resolved the issue for him on her own, independently determining he did not receive a pay increase he was entitled to receive and paying him the discrepancy. (ER EX 52). She effectuates terminations, and cancels employees' benefit coverage when they are terminated. (ER EX 60; Tr. 804).

Gonzalez assists with determining pay rates. For example, when two then-WAM Mentors were designing and leading a virtual session, Perez reached out to ascertain their pay rate. Gonzalez replied to Perez that the rate would be \$25—the Visiting Artist rate.¹⁴ (ER EX 90).

The Operations Manager has a primary role in formulating budgets. She provides all of the financial reporting, is responsible for the QuickBooks implementation,¹⁵ performs accounts payable and receivable. She performs budget forecasting, including payroll forecasting. (ER EX 86, ER EX 87; Tr. 178, 836). Gonzalez participated in discussions with the Executive Directors regarding how to allocate budgeting of staff bonuses. (ER EX 95). Because SAY Sí is a United Way agency, it is subject to audits, and she is the single point of contact for auditors during audits. (Tr. 178). Gonzalez is accountable for ensuring all timecards are submitted and approved in a timely basis.¹⁶ (Tr. 116). Gonzalez directs employees to complete their time sheets, and to submit

¹⁴ The WAM Mentor rate that they were usually paid was \$12.50. (ER EX 17; Tr. 360). Although Gonzalez attempted to negate her response to Perez by stating she was communicating what she was told (Tr. 852), the exchange demonstrates that, at the very least, the co-Executive Directors involved Gonzalez in discussions of determining pay rates.

¹⁵ QuickBooks is the budgeting platform used by the Employer.

¹⁶ Those who have the ability to approve time cards in the timekeeping system are the Operations Manager, the Studio Directors, and the Executive Directors. Beach, however, had only limited access to Insperity. (ER EX 84, Tr. 845, 1021).

any Visiting Artist time sheets. (ER EX 97). She is the final point of approval for submitting to payroll. (Tr. 180). If there is a discrepancy between an approved schedule and hours, she will work with employees to determine if paid time off or sick leave is needed. (Tr.180). Accordingly, employees, supervisors, and managers communicate to her regarding changes to their work schedule, including short term and long term leave, and Gonzalez has the expectation that any updates regarding employees' work schedules or leaves be reported to her. (U EX 52, U EX 53, U EX 54). When Executive Directors were in their positions, the Executive Directors would review time cards¹⁷ after Gonzalez, and the Executive Directors and Gonzalez would confirm among each other money transfers to cover payroll. (ER EX 96).

Gonzalez also participated in updating the WAM Mentor hiring process and updating WAM Mentor applications. In this respect, after Perez gave her and the co-Executive Directors an estimate of the number of WAM Mentors needed per studio and changes to their role, she and Perez worked on updating the WAM Mentor application together. (ER EX 73). Further, Perez after created the WAM Mentor Duties and Agreement document, Gonzalez, Perez, Zivadonivic, Zabala, and Nicole Amri ("Amri") reviewed/edited the document. (ER EX 122a and 122b). Gonzalez oversees employee onboarding. (ER EX 62).

Gonzalez contributes input to studio budgets and is involved in discussions regarding how they track expenses, including Visiting Artist expenses. (ER EX 82). She also pays Visiting Artists, and adjusts shortages.¹⁸ (ER EX 89).

In planning events, Gonzalez directs Marketing Assistant Jessica Beall and Programming Administrative Assistant Angelina Flores to accomplish tasks for those events, such as purchasing

¹⁷ The Employer uses iSolved through Insperity for timekeeping. (Tr. 845).

¹⁸ Although Gonzalez attempted to characterize her payment of Visiting Artists as needing approval, a look at the documents shows that she only informs the Executive Directors, rather than requests or obtains approval. (ER EX 89).

supplies, creating signage, and ticket sales. (Tr. 179). She directs Beall and Flores in contacting external partners to provide volunteers for events and scheduling them. (Tr. 179). She assigns the Development Director to go into online portals to update required payroll or financial data for grants that require periodic reporting. (Tr. 180).

The Operations Manager is considered an executive position. (Tr. 180). During the COVID pandemic, all employees were furloughed from about May 2020 until March or April 2021 (Tr. 310-313), with the exception of Executive Director, the Program Director,¹⁹ Communications Director,²⁰ and Operations Manager. (ER EX 65; Tr. 176, 793).

Since the departure of the Executive Directors, the Operations Manager approves paid time off for employees and is the only person approving timecards.²¹ (Tr. 876, 904).

C. Access to Personnel Files and HR Systems

The record established that the only person who currently has access to personnel files at the Employer is Gonzalez. (ER EX 36; Tr. 177). Gonzalez's access includes to the former Co-Executive Directors' and to all former Executive Directors' personnel files. (Tr. 790). While Beach served as Interim Executive Director, she did not have direct access. If she needed files, she requested them from Gonzalez. (ER EX 36; U EX 12; Tr. 177). Similarly, Board of Directors members do not have access to the personnel files. (Tr. 177). Indeed, for purposes of this hearing, the Employer needed to subpoena certain needed documents from the Operations Manager, including:

- Personnel Files
- Evaluations

¹⁹ The Programs Director position no longer exists. (ER EX 7, ER EX 8; Tr. 53-54).

²⁰ The Communications Director position no longer exists. (ER EX 7; ER EX 8).

²¹ Although Gonzalez stated that her dealings with insurance agencies increased since the departures of individuals from these roles, the record evidence amply establishes that she was the central person negotiating, selecting, and advising with respect to insurance options for years. (ER EX 43b, ER EX 91, ER EX 99).

- Interview notes, which reflect or memorialize recommendations, requests, or decisions to hire individuals
- Offer letters
- Unemployment insurance documents
- Disciplines and documents which reflect or memorialize the decision to discipline individuals
- Job descriptions

(ER EX 68).

The personnel files are maintained by Gonzalez and are physically located in a filing cabinet behind her work area. (Tr. 900). In addition, in one email in the record Gonzalez stated that she had employee files at her house. (ER EX 92). In addition, as Interim Executive Director, Beach was limited in her ability to access Google Workspace, Trello, and Insperity. (Tr. 1021).

D. The Job Descriptions Grant the Studio Directors Supervisory and Managerial Authority and Grant the Development Director Managerial Authority

The Studio Directors' job descriptions set forth supervisory and managerial authority for each of the Studio Directors. (ER EX 9, ER EX 22, ER EX 29, ER EX 34). Beach testified un rebutted that, as clarified to eliminate the references to the Program Director which no longer exists in the organization, each of the job descriptions accurately describes the authority of the position. (Tr. 71, 128-129, 150-151, 162). Specifically, each Studio Director:

- Works with other program directors to ensure high standards, goals, and objectives in [their respective] program are set and met;
- Develops programmatic creative youth development curriculum and internal deadlines;
- Manages program's staff including co-teaching artists, studio assistants, work-study/interns, volunteers and visiting artists. This may include participating in hiring, training, goal-setting, evaluation.
- Provide guidance and mentorship to program's staff, liaisons, mentors and students including goal-setting, project management and supervisory support.

(ER EX 9, ER EX 22, ER EX 29, ER EX 34).²²

²² While Perez testified that there is "a lot of overlap" between her job description and that of Teaching Artist Michael Foerster, a review of their job descriptions shows this not the case. (*Compare* ER EX 22 with ER EX 55). Perez also testified that she is doing everything that is required of her job. (Tr. 353).

Similarly, the Development Director's job description supports a finding of managerial status. The Development Director's duties and responsibilities include:

- Creating and implementing comprehensive, strategic development. . .
 - Execute grant strategy, proposals . . .
- (ER EX 42).

E. The Studio Directors' Input into Policies²³ which Set Forth Supervisory and Managerial Authority of the Supervisors/Managers

In August 2022, Beach asked Gonzalez for the policy manual, confidentiality agreements, conflicts of interest, leasing, and memoranda of understanding since Beach did not have access. (Tr. 103). Gonzalez shared with Beach the policy manual, a couple of confidentiality agreements, and the practice of employees acknowledging and signing the employee handbook/policies and procedures covering a wide array of topics.²⁴ (ER EX 36). In September 2022, Beach drafted proposed updates to the Employer's policies. (Tr. 102). Beach shared proposed changes to the policies, and received input and feedback from Studio Directors, which she incorporated into the final version which was distributed to the staff.²⁵ (UEX 27; Tr. 105).

1. Restorative Management and Termination Policy

The Employer's current Restorative Management and Termination Policy, reviewed for input by the Studio Directors, is the equivalent of a discipline policy. (ER EX 13; Tr. 105-106, 108). References to "supervisor" in the policy are meant to be Studio Directors for studio

²³ Petitioner asked the Studio Directors if they were involved in investigation of issues under policies that were enacted in September 2022 and whether the September 2022 policies were followed. At most, those policies were only in effect for two months at the time of hearing, so this testimony has little value. With the exception of the Restorative Management and Termination (ER EX 14), Employee Success: Performance & Evaluation (ER EX 12), and Employee Relations/Grievance (ER EX 16) policies, no prior policies are in the record. Further, with respect to investigations and complaints generally, the record is devoid of evidence that there have been any at all which would implicate action by the Studio Directors. (Tr. 363, 438-440, 531-533).

²⁴ About a month later, Gonzalez provided Beach with access to the lease agreements. (Tr. 104).

²⁵ Beach's testimony on this topic is unrefuted.

employees and the Development Director for the Data and Development Associate. (Tr. 113). The policy provides that for the supervisor to create a corrective action plan with the employee. (ER EX 13). Ortiz participated in a peer mediation and corrective measure with Julie Vaquera under a past policy. (Tr. 380). The record is devoid of evidence that the current policy has yet been utilized. (Tr. 358).

2. Employee Relations and Grievances Policy

SAY Sí employs a grievance resolution process, set forth in its Employee Relations and Grievances Policy. (ER EX 15). The current policy was reviewed for input by the Studio Directors before it was enacted in September 2022. (Tr. 105-106). Beach testified that references throughout the policy to “supervisor” refer to the Studio Directors for studio employees and Development Director for the Data and Development Associate. (Tr. 114). The grievance procedure is a three step grievance procedure, the first of which is for the grievant to meet with their supervisor. If a resolution is not reached at the first step, the grievance is escalated to the second step, and, absent a resolution, the grievance is then escalated to the Board of Directors. The policy expressly states:

When, through the grievance procedure, it has been determined that the grievance had merit and that the grievant had been treated unfairly, **it is important that the proper remedy be found by the authority named in the corresponding step** restoring a harmonious relationship for the grievant to continue at SAY Sí. **(Emphasis added)**. (ER EX 15).

The record is devoid of evidence that this policy has yet been utilized.

3. Performance Evaluation, Discipline, and Termination

The current Performance Evaluation policy, enacted in September 2022 after review and input by the Studio Directors, provides that “supervisors are expected to constantly discuss performance issues with their employees on an informal basis between reviews, maintaining appropriate records.” (ER EX 11). Beach testified that “supervisors” means Studio Directors and,

when a Data and Development Associate is hired, that employee's "supervisor" for that portion of the policy will be the Development Director. (Tr. 112, 113). The policy sets forth general, undefined criteria and factors to be considered by supervisors: employee's experience and training, time in present job, job description, attainment of previously set goals and objectives, job knowledge, quantity and quality of work, promptness in completing assignments, cooperation, initiative, reliability, flexibility, attendance, judgment, working relationships, and acceptance of responsibility. Beach testified (Tr. 113) that these are to be completed by the Studio Directors and the Development Director for their respective employees. Notably, the policy states that information derived from performance assessments are directly reflected in decisions concerning promotions, transfers, training and development, pay, and continued employment. (ER EX 11).

In addition, the record establishes that under the past policies, Studio Directors provided feedback that was incorporated into performance reviews. A Co-Executive Director sought Ortiz's feedback for ALAS employees' performance reviews. (Tr. 288, 377). Amri requested her notes, they had a discussion, and Ortiz gave input. (Tr. 377-378, 379). One such discussion resulted in the decision not to extend permanent employment to Holly Nanes (also referred to as Maddox in the record). (Tr. 378). Amri sought and implemented Ortiz's opinion with regard to Maddox's continued employment. (Tr. 379). Perez testified that, in the past, she was asked for notes and her opinion, "like if there is any issue." (Tr. 344). Zivadinovic testified that he provided notes and feedback to the co-Executive Directors on the performance of the employees of the HIVE Studio and on Maddox. (Tr. 468, 470-471). Zabala stated in her 2016 self-assessment that she assesses and tracks performances. (ER EX 50).

The only disciplinary example produced and in the record was an email to file contained in Theatre Arts Assistant Julie Vaquera's personnel file in which Ortiz reported that she addressed

Vaquera waiting until the next afternoon to report a student doing drugs. (ER EX 64). There is no evidence in the record that anyone other than Ortiz had input in the decision to handle the matter in the way it was handled. In addition, Ortiz testified that she also corrected Vaquera's inappropriate conduct, after seeking Amri's "advice." (Tr. 383). For example, Ortiz addressed with Vaquera that it was inappropriate for her to be scaring children by sharing her fears about World War III. Further, Ortiz, on her own, addressed Vaquera for making inappropriate comments about students' bodies. (Tr. 384). She also told Vaquera to clean up her mess in the Tech Booth and documented it. (Tr. 385, 386).

4. Internal Accounting and Control Systems

The Internal Accounting and Control Systems Policy was implemented in September 2022 after review by the Studio Directors, and the undisputed testimony established that the policy is followed. (ER EX 27; Tr. 126, 787). Under this policy, all Studio Directors must track their budget and actual costs annually through a platform set by the Operations Manager. Studio Directors must approve purchases for their department before seeking approval and funds from the Operations Manager. The Operations Manager can approve purchases up to \$300. (Tr. 880). The Operations Manager, in partnership with the Executive Director, is responsible for establishing and enforcing written procedures for the use of all open charge accounts and credit cards. The Operations Manager manages petty cash, which is used to purchase items under \$25. A segregation of duties process exists and is followed. (Tr. 787). Under this process, the Operations Manager opens the mail, inputs financial information and reconciles bank statements, makes all normal deposits and provides a ledger of deposits to the Executive Director for signature. The Development Director inputs all income into the development database. The Operations Manager, along with the Executive Director, Board President, and Board Treasurer, has a bank signature

card. The Operations Manager supervises all cash in a secure cabinet to which only she and the Executive Director have access. (ER EX 27).

5. SAY Sí Vehicle Use and Transportation of SAY Sí Students

The current Vehicle Use Policy was implemented in September 2022 after review by the Studio Directors. The policy provides that, in order to operate SAY Sí vehicles, employees must have a current unrestricted driver's license and have prior driving approval from the Operations Manager and the Executive Director and be listed on the SAY Sí insurance policy to operate SAY Sí vehicles. (ER EX 33; Tr. 182-183).

F. Studio Directors' Development of Curriculum

The SAY Sí Policy Manual describes the content of each of the studios, as collected by Beach, with feedback and approval from each of the Studio Directors. (ER EX 1; Tr. 44). The Studio Directors each develop programs of project-based learning where individual projects are taken from ideation through implementation, exhibition, and marketing. (Tr. 64). The Studio Directors develop the curriculum, and determine the program goals, the skills the students will learn, plan the projects, as well as the methods. (Tr. 284, 350). They decide, with collaboration from the students, what will be the outcome of the project, then takes those concepts and, with their expertise, guide and navigate the concepts into reality.²⁶ (Tr. 64, 131, 156, 168). The Studio Directors facilitate sessions in such a way to have those outcomes realized. They develop the lesson plans, the resources required, and the personnel required to realize the projects through realization. (Tr. 64). The Studio Directors assign tasks to students, visiting artists, and staff. (Tr. 157, 165). The Studio Directors budget for what they require in the studio, working with the Operations Manager to acquire the materials they will need. They maintain a network of Visiting

²⁶ In the New Media, or HIVE, Studio, for example, Zivandinovic developed a function which allows students to vote in a poll to select projects. (Tr. 409).

Artists who contribute involvement, they evaluate students' work, change courses when needed, and decide the date the exhibit is going to take place and who will participate. (Tr. 64-65). The Studio Director is responsible for running the studio, and is accountable "for everything." (Tr. 165). They direct the activities, assign tasks, hit deadlines, set deadlines, negotiate with Visiting Artists and third-party partners. (Tr. 165, 170, 171).

In the application process, student applicants indicate for which studio they would like to interview. The Studio Director participates in these interviews, and is ultimately decision maker in deciding which students are accepted into each respective studio. (Tr. 157-158). Studio Directors are responsible for dismissing or removing students from the program.²⁷ (ER 72; Tr. 159).

When working with external partners, the Studio Directors work together to negotiate timelines and schedule resources. If they need additional funding beyond their respective budgets that are allocated to them, they work with the Development Director to identify potential funding sources. (Tr. 65).

G. Studio Directors' Input into Budgeting

In addition to input into policies, Studio Directors have input into budget. At a high level, the budget is completed at the end of the year. Assumptions are made with respect to what will occur the following year across the organization as well as in the individual studios, including staffing assumptions. (Tr. 76). The Board of Directors ultimately approves the budget, after reviewing and asking questions. (Tr. 76). Once the budget is approved, it is "100 percent" in the staff's hands as to how the budget is spent. (Tr. 77). The Studio Directors determine how their budget is allocated. (Tr. 77).

²⁷ While Petitioner's witness claimed that others issued them, no examples were offered into evidence. (Tr. 656).

The record is replete with evidence of the Studio Directors formulating studio and project budgets with the Executive Directors. (ER EX 107c, ER EX 107d, ER EX 107e, ER EX 112, U EX 93; Tr. 1042). Further, Zabala directed the co-Executive Director on the size of the journalism payroll budget, a pilot program directed by Zabala. (ER EX 112).

H. Evidence of Studio Directors and the Development Director Hiring and Effectively Recommending Hire Using Independent Judgment in the Interest of the Employer

The record establishes that the Studio Directors hire and effectively recommend hiring employees. Petitioner seemed to confuse extending an offer of employment with making a decision to hire a candidate. Petitioner's witnesses focused on, as Emmanuelle Maher defined it, who "physically handed [them] the job offer."²⁸ (Tr. 704). With regard to actual hiring authority, the record overwhelmingly establishes that the Studio Directors both made decisions to hire candidates and effectively recommended hire.

Zivadinovic recommended that Amri extend a job offer to Miguel Salazar. (Tr. 414-415, 447). As Zivadinovic described it, he told Amri that he needed an offer letter drafted for Salazar, and "she agreed with [his] judgment that [Salazar] would be the right person for the job." (Tr. 447). Thus, Amri completed the administrative task of sending the offer letter to Salazar. When Maher applied for an internship, his application was forwarded to Zivadinovic for a decision. (Tr. 706). Zivadinovic interviewed him and selected him for the position. (Tr. 716). In addition, Amri hired all of Zivadinovic's recommendations for WAM Mentors. (Tr. 488). The only example Zivadinovic knew of when Amri did not adopt his recommendation for hire was in 2016 or 2017, at which time he was not a Studio Director. (Tr. 448; 490-491). The undisputed testimony is that the Studio Directors determine when their employees are onboarded. (Tr. 78).

²⁸ Indeed, the record demonstrates that the Executive Director does not always sign the offer letter, or may sign the offer letter after an employee is already working in their position. (ER EX 53; U EX 4; Tr. 248).

Ortiz also interviews and hires employees. (Tr. 293). Although Ortiz testified in a manner that attempted to minimize her role in hiring, the record establishes that Ortiz possesses and exercises the authority to hire and recommend hiring. Ortiz first hired Holly Nanes²⁹ as a Visiting Artist for the ALAS Studio in August 2021. As Ortiz noted:

“Because she is also applying for a long-term position, this will be a good opportunity for me to evaluate her fit with the program.” (ER EX 113).

Similarly, when filling a Teaching Artist vacancy, she provided input which was adopted into the job description, and selected which candidates she wanted to interview, including a candidate for which she did not have a resume. (ER EX 123, ER EX 106; Tr. 1033). While she testified that Amri preferred Danysha Lipton as a candidate (Tr. 274-275), Ortiz preferred Holly Nanes (aka Maddox). (ER EX 104). As Amri stated in her November 16 email to Ortiz: “The hiring decision is yours.” Nanes (aka Maddox) was hired.³⁰ (U EX 18; Tr. 306-307). In the course of extending an offer hiring Nanes, Amri asked Ortiz for Nanes’ number of hours, schedule, and input on her rate of pay. (U EX 18).

In addition, Ortiz recommended hiring Solstiz Ibarra Campos as a Studio Assistant, and her recommendation was implemented. Ortiz provided input into the job description that applied to Ibarra Campos, as well as the schedule for the position. (ER EX 125a and 125b). She also discussed with Ibarra Campos their interest in the position and a starting date. (ER EX 105, U EX 23). Once the job offer was prepared, Ortiz reviewed it and extended it to Ibarra Campos.³¹ (ER EX 117).

²⁹ Nanes also uses the name Maddox. (Tr. 273).

³⁰ While Ortiz, once confronted with documentary evidence establishing her role in hiring, asserted that she wanted to hire “Gio,” not Nanes/Maddox, there is nothing in any of the documentary evidence to support this assertion, nor is this consistent with Ortiz’s prior testimony. (Tr. 1029-1030, compare with Tr. 273-275).

³¹ Although Ortiz testified that she “assumed” another job description was “recrafted” once Beach began in her position, the testimony and documents establish that her assumption is incorrect. (U EX 23; Tr. 247).

Ortiz also possesses and exercises the authority to hire Visiting Artists, including long-term Visiting Artists. While waiting to fill the permanent Teaching Artist position for which Ortiz eventually selected Nanes/Maddox, Ortiz hired Nanes/Maddox as a Visiting Artist in a long-term role. (ER EX 123). As Amri stated to Ortiz at the time: “please hire whoever you need for [V]isiting [A]rtist work.” (ER EX 123).

Although Ortiz and Hughes denied Ortiz hired Hughes, the record and documents establish otherwise. Hughes was an ABC Instructor and her contract as well as the contract of fellow ABC Instructor Lundquist to teach at an external school was cancelled at the last minute in August 2022. Lundquist informed Gonzalez of what occurred. (ER EX 100). After Gonzalez informed Beach, Beach suggested that Hughes talk with Ortiz because she had an interest in the theatre program, and suggested to Ortiz that she interview Hughes for a position in the ALAS Studio. (Tr. 75, 992, 993). On August 18, Beach emailed Ortiz and Hughes, stating “I’ve spoken with you individually about exploring an assignment for Katie in ALAS. Please let me know, once you’ve explored the fit, and made a collective decision.” (U EX 31).

On September 6, Ortiz emailed Hughes, stating that Beach suggested that Hughes help in ALAS, but she also heard Hughes was taking on hours to work on the ABC archives. Ortiz asked if Hughes would have time to help, or stop by to talk. (U EX 31).

On September 13, Ortiz reached out to Beach, sharing the Theatre Instructor job description, stating that she was not sure what Hughes’ title will be. Ortiz asked Beach for her thoughts. Beach asked Gonzalez for the ABC instructor job description (Hughes’ job title at the time) for comparison, copying Ortiz. Gonzalez supplied the requested job description, and also supplied the Theatre Arts Teaching Artist job description currently posted for their review. Ortiz replied that ideally a teacher would have a degree and much more theatre experience than Hughes,

but she thought that Hughes could grow into the position. Beach then gave feedback on the position descriptions, stating that the ALA Assistant position was more in line with the \$18 hour job, and Ortiz might consider adding levels to the Teaching Assistant Role, so there could be room to promote. Beach thought Hughes was a Level 2 Teaching Assistant “perhaps?,” but stated it was Ortiz’s call. (ER EX 35).

Importantly, Hughes was hired as a Theatre Studio Assistant, which was not the position that Beach suggested to Ortiz and not the position that was posted at the time. (U EX 4, ER EX 35; Tr. 667). Hughes finally admitted in her testimony that the “result” of her conversation with Ortiz was being a Theatre Arts Assistant. (Tr. 683). In addition, Hughes’ “offer letter,” which states that Hughes began in her position on September 12, was not signed by Beach until September 22, after Hughes was already working in her position. (U EX 4). Accordingly, the documents and weight of evidence simply do not support Ortiz’s and Hughes’ version of events. The weight of evidence establishes that Ortiz had the authority to hire Hughes into the Studio Assistant position, and did, in fact, hire her into that position.³²

In addition, Ortiz hires substitute teachers. The record establishes that in June 2022, Ortiz contacted Calista Olivares and Nathan Cazares and retained them as substitutes. (Tr. 1026; ER EX 102).

³² Hughes’ claim that Beach told her what her rate of pay would be is likewise not supported by her inconsistent testimony. Hughes first testified that she had a conversation with Beach in September about a week before she started in her position, and when she already knew what position she would hold, and that it was in this conversation that Beach told her that her rate of pay would be \$18. (Tr. 691-692). She then stated that Beach told her the rate of pay when Beach first mentioned Hughes potentially working in the ALAS Studio, which documents establish occurred in August. (Tr. 692). When pressed on the inconsistency, Hughes stated Beach brought it up “multiple times,” and “two times” in early September. (Tr. 692-693). Hughes then stated that, contrary to the timeline set forth in U EX 31, ER EX 35, and her prior testimony, that Beach offered her a rate of pay prior to Hughes’ conversation with Ortiz. (Tr. 694). Hughes also stated, contrary to her prior testimony that the “result” of her conversation with Ortiz was that she would be a Theatre Arts Assistant rather than an instructor (Tr. 683), and contrary to both U EX 31 and ER EX 35, that she knew from a discussion with Beach what her position was going to be and her rate of pay prior to talking to Ortiz. (Tr. 695). The documents and internal inconsistencies in Hughes’ testimony demonstrate it should be disregarded as inaccurate.

Zabala also hires and effectively recommends hiring. When Alex Ramirez (“Ramirez”) was hired, Zabala reviewed candidates and selected which ones she wanted to do artist talks, a step in the MAS Studio hiring process. She asked then-Program Coordinator³³ Amri to put together an anonymous survey so students could provide feedback on her selected candidates when the conducted artist talks. Zabala recommended Ramirez for the position. (U EX 15; Tr. 523-524). Then-Executive Director Hinojosa and Amri conducted a final interview with Ramirez and adopted Zabala’s recommendation. (Tr. 524).

In April 2021, Zabala hired three Journalism Studio Producers for a pilot program creating podcasts, who report to her. (ER EX 94; ER EX 126; Tr. 1049). She drafted the job description, determined their hire date, how many hours they would work, rate of pay, and their schedules. In addition, she directed Anahi that their compensation should come out of the UP Partnership Funding. (ER EX 94; ER EX 112).

Perez hires and effectively recommends hiring for the Visual Arts Studio and projects related to the Visual Arts Studio. (Tr. 158). Perez directed the hiring of a contractor to build several walls in the Flex Studio to expand the mount of exhibition space in the Flex Studio. (ER EX 23; Tr. 134). For the Dia De Los Muertos event, Perez hired a Visiting Artist to assist with the silk screening of T-shirts. (Tr. 137). Perez set the term of employment for Studio Assistant Michael Foerster.³⁴ (U EX 13). The record establishes that Perez ultimately makes the decision in hiring WAM Mentors. (ER EX 108; ER EX 49). She hired Mia Perez as a WAM Mentor, with

³³ “Program Director” and “Program Coordinator” are used interchangeably in the record. Until around December 2021, the Studio Directors reported to the Program Director. At that time, the Studio Directors began reporting to the Executive Director. The Program Director/Program Coordinator position was eliminated. (ER EX 7; Tr. 55-56). This can be confusing in the record as the Studio Directors are sometimes referred to as “Program Directors.” (See, e.g., ER EX 98; Tr. 845).

³⁴ Although Perez testified she did not know what “term” meant, the email from Amri defines what is meant—Foerster’s start and end date. (U EX 13).

input from Foerster. (Tr. 360-361).

Although, in addition to Perez, Visual Arts Studio Teaching Artist Michael Foerster also reached out to Visiting Artists, the record does not contain any details as to whether this was on his own or at Perez's request, or that he hired or recommended the Visiting Artist. In fact, the record establishes that he always also involved Perez, even when the Visiting Artist was returning. (U EX 1, U EX 42, U EX 43, U EX 44, U EX 58; Tr. 640, 650, 651-652). Further, each Studio Director negotiates the contracts with the Visiting Artists. (Tr. 138). As Foerster testified, he had no role in facilitating Visiting Artists' contracts and did not even have knowledge as to whether Visiting Artists needed insurance. (Tr. 650). These employment details were completed by the Studio Directors. (Tr. 138). In the Visual Arts Studio, hiring was completed by Perez. Moreover, as Beach testified, each Studio Director has the same authority to contract with Visiting Artists and to schedule them. (Tr. 140, 171).

Indeed, the record establishes that in July 2022, then-co-Executive Director Amri referenced Perez and Zabala authority to hire mentors in communication with Flores. (Rejected ER EX 115).³⁵

The undisputed evidence also establishes that the Development Director possesses and exercises the authority to hire. The record establishes Morales hired Data and Development Associate, Brittany Lopez. (Tr. 75, 189). Beach forwarded resumes to Morales, and Morales determined who he wanted to interview. Morales invited Beach to sit in on the interviews, which

³⁵ Although the Hearing Officer found no significance to the fact that Amri, who was the supervisor of Perez and Zabala, believed that hiring was in the authority of Perez and Zabala as reflected in ER EX 115, this is clear error. Amri's communication to Flores that Perez and Zabala hired WAM Mentors is clearly relevant to the whether the Studio Directors possess hiring authority. With respect to Petitioner's argument (Tr. 981) that Amri may have been new to her role when the exchange occurred, ER EX 10 and ER EX 53 establish that Flores was hired in March 2022, placing the chat reflected in Rejected ER EX 115 on July 12, 2022—less than a month before Amri's tenure with the Employer ended on August 8 (Tr. 958), and long into her tenure with the Employer. Rejected ER EX 115 should be entered into evidence and considered as evidence supporting Perez's and Zabala's hiring authority.

she did; however, she made no recommendations. Morales decided who to hire and made the job offer.³⁶

During the time Beach was in the Interim Executive Director role, her only role in hiring was recommending Katie Hughes for interviewing, and identifying applicants for the Data and Development Associate.³⁷ (Tr. 74-75). Although Petitioner suggested that Beach had a role in hiring, the evidence establishes she did not. While she signed offer letters, she did so pursuant to instruction of Gonzalez, and **after** the employees who were receiving the letters already were working in their positions for the Employer. Thus, Beach signed ALAS Studio employee Solstiz Ibarra Campos' offer letter on August 11—3 days **after** Ibarra Campos signed the letter accepting the offer. (U EX 23; Tr. 247). Other than signing Ibarra Campos' offer letter after they were already employed with the employer, Beach had no involvement with hiring Ibarra Campos. (Tr. 248). Likewise, Beach signed Hughes' offer letter after Hughes had signed the offer letter accepting her position, and **ten days** after Hughes began working in her position. (Tr. 248).

I. Day to Day Operations in the Studios

Although the studios are collaborative, this does not mean no one is in charge. The Studio Directors have the authority to give employees job assignments and tell employees in their studios that a task was not done correctly. (Tr. 100, 140, 169). For example, Ortiz testified that although she has costume experience, Hughes wanted to make a hat for Dia De Los Muertos. Ortiz testified: "I'm like go for it." (Tr. 288). Another example provided was Zivadinovic assigning Miguel

³⁶ The transcript incorrectly states in one section that Beach stated "I did" rather than "Javier [Morales] did" in response to who made the decision to hire Lopez, decided her rate of pay, decided her first day, and assigned her tasks. (Tr. 190, lines 6, 8, 10, 13). Accordingly, the Employer has moved to correct the transcript to accurately reflect testimony. In addition, other portions of the transcript make clear that Morales did hire Lopez, and assigned her tasks, not Beach. (See Tr. 75, 189, and 190, line 15).

³⁷ The Board of Directors have no role in hiring or personnel management other than with respect to the Executive Director. (Tr. 76, 175). Further, the Board of Directors had no role in reviewing or approving the policy manual. (Tr. 210).

Salazar to do a project with animation. In response, Salazar developed a rotoscope³⁸ project for Muertos Fest. (Tr. 411). Perez testified that she has the ability to tell employees to come in on time. (Tr. 336). Ortiz assigns tasks to substitutes, and gives them direction as to what time to report. (ER EX 102). Zabala stated in her 2016 self-assessment that she trains and assigns specific tasks to employees. (ER EX 50). She specifically trained Ramirez and Sergio Ramos. (Tr. 540). Beach's undisputed testimony establishes that she did not on any occasion tell employees who reported to Studio Directors how to do their work, nor did she have any input into their job assignments, and the record is devoid of evidence that any Executive Director did so. (Tr. 79).

The Studio Directors schedule the calendars of activities for employees, Visiting Artists, and students in their studios. (ER EX 21, ER EX 24, ER EX 31, ER EX 41; Tr. 191). For example, Zivadinovic maintains the schedule for the HIVE studio, scheduling meetings and studio sessions. (ER EX 21). Perez maintains the schedule for the Visual Arts studio, maintaining the calendar of events, activities, and meetings. (ER EX 24; Tr. 139). Likewise, Ortiz sets and maintains the schedule for the activities and performances of the ALAS studio. (ER EX 41; Tr. 169). Zabala, in addition to maintaining the calendar and schedule for the work of the MAS studio, oversees the work journalism producers through the UP Project. (ER EX 31; Tr. 1042-1043).

The Studio Directors set the dates for when exhibits will occur, and ultimately are responsible for ensuring that tasks are completed to meet those deadlines. (Tr. 101, 170). Studio Directors set performance expectations for their employees. An example of this in the record was when two then-WAM Mentors designed and led a virtual session for the Visual Arts Studio. Perez shared that she planned to Zoom with them briefly to "review expectations." (ER EX 90).

³⁸ Rotoscope is a technique where animators trace over real life footage frame by frame, to produce realistic action. (Tr. 411).

Despite Petitioner's witnesses' claims that everyone schedules themselves, the documents show that the Studio Directors have oversight over scheduling. The Studio Directors decide with their employees the studio employees' schedules and can change them on their own. (Tr. 140, 146, 158, 168-169, 170). As noted above, in the course of extending an offer hiring Nanes/Maddox, Amri asked Ortiz for Nanes' number of hours and schedule. (U EX 18). When Ortiz effectively recommended Ibarra Campos for hire, she set the schedule for the position. (ER EX 125a and 125b). Even when the Program Coordinator position still existed, Ortiz set schedules for employees: Julie Vaquera's job offer states that her Saturday schedule is "to be determined" by Ortiz and then-Program Coordinator Amri. (ER EX 63). Zabala stated in her 2016 self-assessment that she coordinates employee schedules. (ER EX 50).

When the Executive Director positions were occupied, the record includes examples of employees informing them of schedule changes; however, the communications make clear that the employees had already discussed the schedule changes with the Studio Directors, and the Studio Directors are always copied or included in discussions of schedule changes.³⁹ (U EX 34, U EX 35, U EX 49, U EX 61, ER EX 70; Tr. 116). For example, Maher sent an email to the Executive Directors sharing their new schedule. They state: "After chatting with Stevan, it's been decided that my hour(s) on Monday would be best used elsewhere." (U EX 61). Studio employees call their respective Studio Directors when they will be late or absent. (Tr. 114, 115, 142, 145-146, 159, 169).

The Studio Directors maintain the WAM Mentors' schedules. For example, in the Visual Arts Studio, Perez set the schedule on Trello for the WAM Mentors to complete by checklist. If Mentors need to change their schedule, Perez instructs on the Trello card, "If you need to switch

³⁹ Although some employees tried to characterize the inclusion of the Studio Directors as "keeping their co-teachers in the loop," (Tr. 708) other studio personnel are rarely included on these emails.

hours, please change it on the schedule, and send **me** a text or post on this card.” (emphasis added). (U EX 29). Notably, the administrative staff does not have access to the Trello site. (Tr. 327). In the HIVE Studio, Zivadonivic maintains the WAM Mentors’ schedule, instructing on the schedule for the Mentors to text for last minute notifications (ER EX 59).

The Studio Directors review WAM Mentors’ timecards. (Tr. 453). All other employees enter their time into Insperity, which is reviewed by Gonzalez. (Tr. 467, 687).

The Studio Directors schedule and hold weekly meetings with their studio assistants and teaching artists. (ER EX 20, ER EX 21; ER EX 24; ER EX 26; ER EX 30; Tr. 119, 121, 122, 147, 159, 170). Studio Directors attend staff meetings, a weekly programming meeting that all Studio Directors and the Programming Administrative Assistant attends (Tr. 117-118, 147, 159, 170), planned by the Studio Directors. Its purpose is to ensure that there is cohesion, exhibits, events, and norms across the studios. (Tr. 118). The Studio Directors also attend a monthly Teaching Artist meeting, organized by Perez. (Tr. 117-118, 147, 159, 170). In addition, the Studio Directors attend external partner meetings, to the extent coordination is required for an external exhibit, where they provide proposals, plan, and coordinate. (Tr. 117, 119, 147, 170). The Studio Directors plan external meetings on their own. (Tr. 119).

J. Studio Directors’ Management of External Projects

The Studio Directors manage external projects on their own and in conjunction with the Executive Director or co-Executive Directors. As Zivadinovic stated, they all have different sorts of connections in the community that they bring to the table, and “sometimes different kinds of []opportunities fall into our laps, and sometimes these opportunities will come from up on high, and then we will [] look through the staff that we have available, and [] are like ‘This fits. We can

make this happen.’” (Tr. 399). Part of Studio Directors’ duties is to create these types of opportunities. (Tr. 400).

Zabala works with an external partner called Up Partnership on two current projects. One project involves creating podcasts, and for the other, she is organizing and leading an exhibit called “We are Now,” for which she has been accepting applications. (Tr. 155, 969). Zabala is the single point of contact for these external partners, coordinating logistics, developing programming with them. (Tr. 156). She assigns tasks to students, a visiting artist, or her own staff from ideation to the exhibition, and is responsible for the completion of those tasks throughout all stages of the project. (Tr. 156). She negotiates the timing and progress of the projects with the partner. She also decides the timelines as to when work must be completed by employees to meet those timelines. (Tr. 156). As described above, she also hired Journalism Studio Producers to staff for the podcast project, who report to her, and she drafted the budget for the project. (ER EX 107c, ER EX 107d, ER EX 107e, ER EX 112, ER EX 94 ER EX 126; Tr. 1049).

An example of an exhibit that Perez developed and managed with external partners was a project with Methodist Healthcare System to elevate the awareness of Breast Cancer Awareness Month. Perez directed the concepting, as well as the inclusion of visiting artists and students in the construction of the massive sculpture that sits at the San Antonio Airport. (Tr. 132). Perez facilitates and leads the students in all stages of the project from concepting all the way to construction and exhibits. She acquires and allocates resources that are required. Each studio has its own budget that they can use for projects throughout the year, so she knows what her budgets are, and can allocate those. She can reach out if she determines she needs additional funding. (Tr. 133). She identifies the tasks that are required to complete the projects, ensures that they are covered by individual students, employees, or visiting artists. For example, for the airport project,

she needed assistance building a platform, so she directed SAY Sí's custodian to build the platform and directed the accomplishment of that task. (Tr. 134).

Zabala and Perez are also negotiating on behalf of SAY Sí to partner with the Blue Star Project, a 501(c)(3) organization with galleries for students to exhibit work. (Tr. 155, 160-161).

Zivadinovic described in testimony examples of projects he oversaw and implemented. In one, an external partner, Luminaria, asked SAY Sí for programming, and Zivadinovic put together an application he had used in the past for a mosh pit piece and submitted it to Luminaria. (ER EX 58; Tr. 391). He did the same for an opportunity for the San Pedro Creek opening. (Tr. 391). He checked with Beach to see if anything had occurred that would supersede him asking for a fee, as he had in the past. (Tr. 395-396). Beach made no changes to Zivadinovic's proposal, and it was submitted as Zivadinovic drafted it. (Tr. 444).

K. Filling the Executive Director Position Will Not Impact the Supervisory or Managerial Authority of the Studio Directors, the Operations Manager, or the Development Director

In about mid-October, after Beach's tenure as Interim Executive Director ended, SAY Sí posted the position of Executive Director and is currently seeking to fill it. (ER EX 119; Tr. 985, 986). The duties and responsibilities of the Executive Director in no way detract from or even overlap with the supervisory and managerial duties and responsibilities of the Studio Directors, Operations Manager, or Development Director. Indeed, the Executive Director's hiring, supervision, and evaluation authority is explicitly limited to the management staff: "hires, supervises and evaluates management staff." (ER EX 119). Further, the Program Director position no longer exists which, if anything, amplifies the supervisory and managerial role of the Studio Directors. As Zabala testified, she used to have even more managerial duties in the past when there was no Program Director and she reported directly to the Executive Director. (Tr. 537).

L. Disparity in Compensation and Benefits

The record establishes disparity in both the method and the amount of compensation when comparing the Studio Directors, Operations Manager, and Development Director with the rest of the putative voting unit. With the exception of the Program Administrative Assistant, the remainder of the putative voting unit, excluding the disputed classifications, are paid hourly. Further, there is a wide disparity between the amount the Program Administrative Assistant is paid when compared with the Studio Directors, Development Director, and Operations Manager:

Program Administrative Assistant	\$32,000
Development Director	\$52,000
Media Arts Director	\$51,331.28
Operations Manager	\$50,000
Visual Arts Director	\$45,000
Theatre Arts Director	\$44,863
New Media Director	\$43,000

The rest of the studio employees in the voting unit earn between \$15/hour and \$18/hour. (ER EX 10), while WAM Mentors earn \$12.50/hour. (ER EX 17; Tr. 360).

Notably, the only individual at the Employer with access to compensation information in employee files and HR systems is the Operations Manager. (Tr. 72). When Beach needed salary information when she was in the position of Interim Executive Director, the only way she was able to obtain the information was to request it from Gonzalez. (Tr. 72, 130). Beach's understanding was that Gonzalez obtained salary and compensation information from the payroll system, which she could not access. (Tr. 72, 130).

The Studio Directors, the Operations Manager, Development Director, and Program Administrative Assistant are full-time employees and receive benefits. (Tr. 556, 900). The rest of the voting unit are hourly employees and do not receive benefits. (Tr. 555, 648, 687).

M. WAM Mentors are High School Students

WAM Mentors work in one of the four studios. The SAY Sí website makes clear that the program is for high school students:

WAM, SAY Sí's multidisciplinary middle school program, is a year-round program in visual arts, theatre, media arts and new media. **SAY Sí employees its junior and senior high students to work as student instructors**, allowing for reciprocally beneficial peer-to-peer mentoring. (Emphasis added). (ER EX 47).

According to the WAM Mentor application material:

A mentor in SAY Sí's middle school program is **a high school junior or senior** who helps teach, advise and guide middle school students through their artistic work. **(Emphasis added)**. (ER EX 17).

The intent of the program is to assist Junior and Senior High School students in receiving exposure to being in the classroom in a different role other than student. (Tr. 185). Rather, they are in a peer-to-peer mentoring role. The program was designed specifically to allow and enable high school seniors and sometimes juniors to participate in a leadership instructional role. (Tr. 959). Some of SAY Sí's funding comes from the fact that the program is for high school students. (Tr. 185). As Zivadonovic noted regarding the process for hiring WAM Mentors, "the WAM Mentors need to be students, first of all" and "mentors are students." (Tr. 484, 486). Zabala confirmed that WAM Mentors are high school students. (Tr. 541).

Further, the WAM Mentor duties and agreement document, which was created by Perez, and edited and/or reviewed by Gonzalez, Perez, Zivadonovic, Zabala, and Amri states that the signer of the document is a student. (ER EX 122a and 122b).

At the end of the WAM Mentor's tenure they participate in a graduation ceremony. Then, if there are positions available, they can apply to become ABC Instructors.⁴⁰ (Tr. 957).

⁴⁰ This is what occurred with Lundquist. (ER EX 101; Tr. 914).

In preparation for hearing, Beach asked Gonzalez for payroll information for all WAM Mentors for the eligibility period—the thirteen weeks prior to hearing.⁴¹ (Tr. 81). Gonzalez supplied information for the following individuals:

- Angelina Renae Mason
- Paloma Zenteno
- Leila Diane Medina
- James Dahvin Lee
- Danielle Gaus
- Cora Sage Dennis (ER EX 18).

The hours worked in the thirteen weeks prior to the hearing by the WAM Mentors were as follows:

WAM Mentor	Hours worked	Average weekly hours worked between July 29, 2022 through October 28, 2022
Angelina Mason	23.13	1.77
Paloma Zenteno	14	1.07
Leila Medina	43.25	3.32
James Lee ⁴²	18	1.38
Danielle Gaus	24.34	1.87
Cora Dennis	29	2.23

(ER EX 18).

The Studio Directors hire the WAM Mentors and inform the WAM Mentors that they are hired. (ER EX 49; Tr. 99, 159, 169). They oversee the WAM Mentors’ onboarding in conjunction with the Operations Manager (ER EX 98), and provide orientation to the WAM Mentors on their scheduling and duties. (ER EX 49). Studio Directors are considered WAM Mentors’ “managing supervisors” (ER EX 98) and, since about January 2022, verify WAM Mentor time cards prior to the Operations Manager reviewing and processing their payroll. (Tr. 562; ER EX 97, 98). The

⁴¹ Gonzalez is the only individual at the Employer with access to payroll information.

⁴² James Lee continued to be scheduled as a WAM Mentor after the co-Executive Directors were no longer in their positions without Interim Executive Director Beach’s knowledge even though he had graduated from the program. (Tr. 959).

Executive Directors and Board of Directors have no role in hiring WAM Mentors. (Tr. 99).

Notably, the only individuals who schedule the hours of the WAM Mentors are the Studio Directors. Beach had no role in scheduling WAM Mentors. (Tr. 957).

1. Reese Lundquist is an ABC Instructor

Lundquist has been an ABC Instructor since about August 2021. Prior to becoming an ABC Instructor, they were a WAM Mentor. (ER EX 101; Tr. 688-689). Lundquist testified that when they began as a WAM Mentor, it was expected that the assignment would not continue after graduation. (Tr. 912). On August 15, Lundquist informed Gonzalez that their contract was not signed and that the principal at the school they were to teach decided not to renew the contract with SAY Sí. (ER EX 100). Due to this unexpected occurrence, Lundquist was permitted to perform mentor duties until their next contract begins, which should be “any day now.”⁴³ (Tr. 87).

Lundquist is slated to start in a new position as an ABC instructor with Stafford Elementary Visual & Performing Arts as soon as the paperwork is finalized. (ER EX 120; Tr. 988). Of note, when, in preparation for the hearing, Beach requested from Gonzalez payroll records for all WAM Mentors, Gonzalez did **not** supply records for Lundquist. (ER EX 18; Tr. 88).⁴⁴ Further, Lundquist’s wage rate is \$15.00/hour, while WAM Mentors earn \$12.50 an hour. (ER EX 17; Tr. 360). Beach testified that, to her knowledge, Lundquist was an ABC Instructor. There is no evidence in the Employer’s files, other than ER EX 10, which is based upon information supplied by Gonzalez, to suggest that Lundquist maintained her position as WAM Mentor simultaneously

⁴³ While Lundquist testified that they never stopped working as a WAM Mentor, emails refer to them as an ABC Instructor in August 2022. In addition, it would not make sense for the Employer to find Lundquist a temporary position performing WAM Mentor duties if Lundquist was already a WAM Mentor. (ER EX 100). Also, although Lundquist asserted Helix Mason worked as a WAM Mentor after high school, nothing in the record corroborates this hearsay testimony.

⁴⁴ Beach testified that Lundquist’s job title as listed in ER EX 10, which was information provided by Gonzalez, was not accurate. As Beach testified, Lundquist was temporarily assigned to perform WAM Mentor duties while they awaited Lundquist to start their new contract with Stafford Elementary Visual & Performing Arts. (ER EX 120; Tr. 155, 988).

with her position as ABC Instructor. As Beach testified, the process, after WAM Mentors graduate is for them to apply to be ABC Instructors, which is what Lundquist did, and they were successfully placed in an ABC Instructor position at that time. (ER EX 101).

2. To the Extent James Lee Continued to Work as a WAM Mentor, He Did So Contrary to the Intent of the Program

In January 2022, Lee was hired as a WAM Mentor. (Tr. 921). In mid to the end of July, he graduated from the WAM Mentor program. (Tr. 958). He apparently was allowed to continue to work as a WAM Mentor by the Studio Directors. The unrefuted testimony establishes that following graduation, the school was shut down for a week and, when it reopened, the Co-Executive Directors were each given their performance appraisals and a 30-day performance development plan. They promptly submitted their resignations, which were accepted on August 8. They were allowed to leave that same day. (Tr. 958). On August 10, Beach began as Interim Executive Director. (Tr. 958). Significantly, Lee did not accrue any hours reflected in the record following graduation until August 16, after the co-Executive Directors were no longer in their positions.⁴⁵ (ER EX 18). Beach testified un rebutted that she did not authorize Lee to work as a WAM Mentor and had no knowledge that he was working as a WAM Mentor. (Tr. 959). If anything, the fact that the Studio Directors allowed Lee to work as a WAM Mentor after the co-Executive Directors left without Beach's knowledge and contrary to the intent of the WAM Mentor program illustrates the supervisory and managerial authority of the Studio Directors. (Tr. 959).

⁴⁵ Although the hearsay claim that Angelina "Helix" Mason is no longer a high school student was not substantiated, to the extent the Regional Director ascribes it any weight, it is noteworthy that Mason also did not accrue any hours reflected in the record after the graduation date until August 16. (ER EX 18).

III. LEGAL ARGUMENT

A. The Petitioned-For Studio Directors, Operations Manager, and Development Director Are Supervisors As Defined In Section 2(11) of the Act

Section 2(11) of the Act defines “supervisor” as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11).

It is well settled that the definition of supervisory status under Section 2(11) of the Act is stated in the disjunctive; one of the listed indicia is sufficient to confer supervisory status. *Great American Prod.*, 312 NLRB 962 (1993); see also, *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958 (2004) (“an individual need possess the authority to perform only one of the enumerated functions”). Furthermore, it is the possession of authority to engage in any of the functions listed in Section 2(11), even if this authority has not yet been exercised, that determines whether an individual is a supervisor. *Wal-Mart Stores*, 340 NLRB 220, 223 (2003); *Fred Meyer Alaska, Inc.*, 334 NLRB 646, 649 Fn.8 (2001); *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1991). Here, the Studio Directors, Operations Manager, and Development Director actually exercise supervisory authority.

Moreover, the power to “effectively recommend” action with respect to one or more indicators of Section 2(11) authority results in statutory supervisory status, just as much as the independent, actual power to make decisions in these areas. *Albertsons, Inc.*, 310 NLRB 960 (1993) (grocery department managers were statutory supervisors because they could effectively recommend hiring, discipline, transfer, layoff and promotion); *K.B.I. Security Services*, 318 NLRB

268 (1995) (employee was a statutory supervisor because he could effectively recommend formal discipline).

Further, the Board has explained that there are “secondary indicia” that may be considered in determining supervisory status. Secondary indicia include:

- The ratio of supervisory to non-supervisory employees;
- Whether the individual is compensated differently or better than other employees;
- Whether the individual is held out as a supervisor;
- Whether the individual works in a separate work location, such as an office or a desk, from the other employees;
- Whether the individual receives benefits or privileges that are not granted to other employees;
- Whether the individual works in a separate work location, such as an office or a desk, from the other employees;
- Whether they can access personnel files.

The burden to establish supervisory authority is on the party asserting it. *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006). Further, the asserting party must “establish it by a preponderance of the evidence.” *Id.* (citing *Dean & Deluca*, 338 NLRB at 1047). As discussed below, the Studio Directors, Operations Manager, and Development Director are clearly supervisors under the Act.

1. The Studio Directors’ Job Descriptions Establish their Supervisory Authority

The Studio Directors’ job descriptions set forth their supervisory authority. Specifically, for each of the Studio Directors, they possess the following authority:

- Manages program’s staff including co-teaching artists, studio assistants, work-study/interns, volunteers and visiting artists. This may include participating in hiring, training, goal-setting, evaluation.

- Provide guidance and mentorship to program’s staff, liaisons, mentors and students including goal-setting, project management and supervisory support.

(ER EX 9, ER EX 22, ER EX 29, ER EX 34; Tr. 71, 128-129, 150-151, 162).

2. The Studio Directors, Operations Manager, and Development Director Hire and/or Effectively Recommend Hiring Using Independent Judgment in the Interest of the Employer

The record overwhelmingly establishes that the Studio Directors, Operations Manager, and Development Director have the authority to hire and to effectively recommend hiring, and exercise that authority. The authority to effectively recommend generally means, “the recommended action is taken without independent investigation by superiors[.]” *Children’s Farm Home*, 324 NLRB 61, 61 (1997); *see also DirecTV*, 357 NLRB 1747, 1748–49 (2011); *Ryder Truck Rental*, 326 NLRB 1386 (1998). Effective hiring recommendations establish supervisory status. *Fred Meyer Alaska, Inc.*, 334 NLRB 646, 649 (2001); *Detroit College of Business*, 296 NLRB 318, 319 (1989); *Lawson Milk Co.*, 143 NLRB 916, 919–20 (1963).

The job descriptions of the Studio Directors grant each of them the authority to hire. (ER EX 9, ER EX 22, ER EX 29, ER EX 34; Tr. 71, 128-129, 150-151, 162). The record establishes that each of the Studio Directors exercises this authority to hire. New Media (HIVE) Studio Director Zivadonivic hired Maher for his internship (Tr. 716). Theatre Arts (ALAS) Studio Director Ortiz hired Hughes for a different position than she discussed with Beach and than the position that was posted at the time. (U EX 4, U EX 31, ER EX 35; Tr. 75, 667, 992, 993). Ortiz hires substitute teachers. (ER EX 102; Tr. 1026). Ortiz selected Nanes/Maddox as a long-term Visiting Artist. (ER EX 113, 123). She then selected Nanes/Maddox to fill a Teaching Artist position, even though Amri preferred a different candidate. (Tr. 274-275; 306-307). Media Arts Director (MAS) Zabala hired three Journalism Studio Producers. (ER EX 94, ER EX 126; Tr. 1049). Visual Arts Director Perez hired a contractor to build several walls to expand the exhibition

space in the Flex Studio, and hired a Visiting Artist to assist with the silk screening of T-shirts. (ER EX 23; Tr. 134, 137). Perez hired Mia Perez as a WAM Mentor. (Tr. 360-361). Perez also hires Visiting Artists, and completes their employment details. (Tr. 138, 140, 171). Development Director Morales hired Data and Development Associate Brittany Lopez. (Tr. 75, 189).

In addition, Zivadinovic effectively recommended the hire of Miguel Salazar. (Tr. 414-415, 447). As Amri noted in response to Zivadinovic's recommendation, she "agreed with [his] judgment that [Salazar] would be the right person for the job." (Tr. 447). Amri hired all of Zivadinovic's recommendations for WAM Mentors. (Tr. 488). Ortiz effectively recommended Ibarra Campos for hire, determining their starting date, their schedule, and providing input into their job description. Ortiz reviewed the final job description and extended it to Ibarra Campos. (ER EX 105, U EX 23, ER EX 117, ER EX 125a, ER EX 125b).

Similarly, Zabala effectively recommended Ramirez for hire. (U EX 15; Tr. 523-524). Although then-Director Hinojosa and Amri conducted a final interview with Ramirez before adopting Zabala's recommendation, the record is devoid of evidence they interviewed anyone else. Accord *Mountaineer Park*, 343 NLRB 1473, 1476 (2004) (even though an employee's superior reviewed a recommendation and added his own judgment, because the superior gave "weighty" "reliance" to the subordinate's recommendations, subordinate was a 2(11) supervisor).

Gonzalez selected the CPA for the Employer, conducting interviews, compiling information, collecting proposals, comparing and analyzing costs, contacting references, presenting to the leadership team, and "ultimately finding the best candidate" for the Employer. (ER EX 43b).

Under these circumstances, the Studio Directors, Operations Manager, and Development Director are clearly supervisors within the meaning of Section 2(11) of the Act. *The Kent County*

Association for Retarded Citizens, 227 NLRB 1439 (1977) (Director of Adult Programs possess effective authority to hire where she interviews candidates for jobs, recommends one candidate to executive director, and this recommendation is usually followed). This indicia alone is sufficient for a finding of supervisory status under Section 2(11) of the Act.

3. The Studio Directors and Development Director Effectively Recommend Rewarding Employees and Effectively Recommend Terminations through their Input into Evaluations Using Independent Judgment in the Interest of the Employer

The Studio Directors and Development Director possess the authority under the current Performance Evaluation policy to conduct evaluations which, according to the policy, “are directly reflected in decisions concerning promotions, transfers, training and development, pay, and continued employment.” (ER EX 11).

Under past policies, the Studio Directors provided feedback which was incorporated into performance reviews. In this respect, Amri solicited Otiz’s feedback with regard to Nanes/Maddox for her performance review and her opinion on Nanes/Maddox’s continued employment, which Ortiz provided. This resulted in the decision not to extend Nanes/Maddox’s employment contract. (Tr. 377-378, 379). Similarly, Perez was asked to provide her notes and opinion. (Tr. 344). Zivadinovic also provided notes and feedback. (Tr. 468, 470-471). Zabala, in her 2016 self-assessment, stated that she assesses and tracks performances. (ER EX 50).

As such, the Studio Directors effectively recommend rewards and terminations for employees. *Phelps Community Medical Center*, 295 NLRB 486 (1989).

4. The Studio Directors and Development Director Possess the Authority to Discipline and Effectively Recommend the Discipline of Employees Using Independent Judgment in the Interest of the Employer

To establish the supervisory authority to discipline, asserted disciplinary authority “must lead to personnel action without independent investigation by upper management.” *Veolia*

Transportation Services, 363 NLRB No. 98, slip op. at 7 (2016) (citing *Sheraton Universal Hotel*, 350 NLRB 1114, 1116 (2007) and *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 669 (2001), enfd. in pertinent part 317 F.3d 316 (D.C. Cir. 2003)). *See also Lucky Cab Co.*, 360 NLRB 271 (2014). The record establishes the Studio Directors and the Development Director possess the authority to discipline. Indeed, the only “discipline” in the record is a note in the personnel file of authored by Ortiz, in which Ortiz reported that she addressed Vaquera waiting until the next afternoon to report a student doing drugs. (ER EX 64). There is no evidence in the record that anyone other than Ortiz had input in the decision to handle the matter in the way it was handled.

In addition, Beach testified that references to “supervisor” in the current Restorative Justice policy are meant to be Studio Directors for studio employees and the Development Director for the Data and Development Associate. (Tr. 113). The policy provides that for the supervisor to create a corrective action plan with the employee. (ER EX 13). Ortiz participated in a peer mediation and corrective measure with Julie Vaquera under a past policy. (Tr. 380). The record is devoid of evidence that the current policy has yet been utilized. (Tr. 358).

The fact that most of the Studio Directors and the Development Director had not yet disciplined anyone under the policy does diminish their supervisory status. *Pepsi-Cola*, 327 NLRB 1062, 1064 (1999) (holding, “we do not draw a distinction between those [putative supervisors] who in fact have exercised their authority to discharge and those who have not; the determinative factor is that all such [putative supervisors] possess the authority to do so.”); *Fred Meyer*, *supra* (applying same principle to hiring in context where some putative supervisors only hired once, and stating, “The rule clearly is established in Board precedent that possession of authority...is sufficient to establish supervisory status, even if this authority has not yet been exercised.”) (emphasis in original).

5. The Studio Directors, Development Director, and Operations Manager Assign Work to and Responsibly Direct Work of Employees Using Independent Judgment in the Interest of the Employer

For purposes of Section 2(11), the term “assign” refers to “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” *Oakwood Healthcare*, 348 NLRB at 689. Similarly, for a putative supervisor to “responsibly” direct others, “the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.” *Id.* at 691–692. In other words, “the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary.” *Id.*

The record leaves no doubt the Studio Directors, Development Director, and Operations Manager exercise independent judgment in assigning work. Using professional judgment in exercising supervisory authority clearly demonstrates that they are Section 2(11) supervisors. See *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001) (reversing Board's determination that nurses do not exercise independent judgment because they use their ordinary professional judgment in carrying out their duties).

While the employees may express a preference or an interest in a particular task, the Studio Directors are responsible for ensuring that the outcomes are achieved. (Tr. 64). Further, the record establishes specific examples of Studio Directors assigning with regard to place, time, or overall tasks, which the Board has found confers supervisory status. *The Arc of South Norfolk*, 368 NLRB No. 32, slip op. at 5 (2019). Thus, Zivadinovic assigned Salazar a project with animation. (Tr. 411). Ortiz assigned tasks to substitute teachers, and gave them direction as to what time report.

(ER EX 102). When Hughes wanted to make a hat for Dia De Los Muertos, Ortiz assigned this task to her. (Tr. 288). Zabala stated in her 2016 self-assessment that she trains and assigns specific tasks to employees. (ER EX 50).

In addition to assigning tasks, the Studio Directors assign with respect to time and place. The Studio Directors schedule and maintain the calendars of activities for employees and Visiting Artists. (ER EX 21, ER EX 24, ER EX 31, ER EX 41; Tr. 191, 192, 193). Further, the Studio Directors decide studio employees' schedules and can change them on their own. (ER EX 125a and 125b, ER EX 50; Tr. 140, 146, 158, 168-169, 170).

Gonzalez directs Marketing Assistant Jessica Beall and Programming Administrative Assistant Angelina Flores to accomplish tasks for events, such as purchasing supplies, creating signage, and ticket sales. (Tr. 179). She directs Beall and Flores in contacting external partners to provide volunteers for events and scheduling them. (Tr. 179). She assigns the Development Director to go into online portals to update required payroll or financial data for grants that require periodic reporting. (Tr. 180).

Gonzalez is accountable for ensuring that all timecards are submitted and approved in a timely basis. (Tr. 116). Accordingly, she directs employees to complete their time sheets, and to submit Visiting Artist time sheets. (ER EX 97).

Similarly, the Development Director assigned the Data and Development Associate tasks. (Tr. 190, lines 13 and 15, as corrected pursuant to Motion to Correct Transcript).

6. The Studio Directors, Development Director, and Operations Manager Adjust Grievances Using Independent Judgment in the Interest of the Employer

To establish the statutory authority to adjust grievances, a party must show disputed individuals have authority to actually adjust grievances, not merely minor disputes (such as

complaints regarding workload or lunch and break schedule conflicts). *Ken-Crest Services*, 335 NLRB 777, 779 (2001).

Both the Studio Directors and the Development Director possess the authority to adjust grievances under the current Employee Relations and Grievances Policy. Beach testified that references throughout the policy to “supervisor” refer to the Studio Directors for studio employees and Development Director for the Data and Development Associate. (Tr. 114). The grievance procedure is a three step grievance procedure, the first of which is for the grievant to meet with their supervisor. If a resolution is not reached at the first step, the grievance is escalated to the second step, and, absent a resolution, the grievance is then escalated to the Board of Directors. The policy expressly states:

When, through the grievance procedure, it has been determined that the grievance had merit and that the grievant had been treated unfairly, **it is important that the proper remedy be found by the authority named in the corresponding step** restoring a harmonious relationship for the grievant to continue at SAY Sí. (**Emphasis added**). (ER EX 15).

With regard to the Operations Manager, the record evidence established that Gonzalez adjusts informal grievances. To that end, when Michael Foerster believed he did not receive his pay increase, Gonzalez resolved the issue for him on her own, independently determining he did not receive a pay increase he was entitled to receive and paying him the discrepancy. (ER EX 52; Tr. 798). The record shows she adjusts Visiting Artists’ pay shortages. (ER EX 89). Compare with *Ken-Crest Services*, supra (Board found individual was not a supervisor where only relayed grievance to upper management or simply offered advice or suggestions).

7. Secondary Indicia Further Supports a Finding of Supervisory Status

Though not dispositive, secondary indicia provide useful background evidence in supervisory status determinations. See *Training School at Vineland*, 332 NLRB 1412, 1412 fn. 3

(2000); *Chrome Deposit Corp.*, 323 NLRB 961, 963 fn. 9 (1997). Here, several secondary indicia further support a finding of supervisory status for the Studio Directors, the Development Director, and the Operations Manager.

a. If the Studio Directors Are not supervisors, then the studio employees have no supervisor

Although not itself a statutory indicia, the ratio of supervisors to rank-and-file employees is a background factor which may enter into Board consideration when resolving a supervisory issue. *Ken-Crest Services*, 335 NLRB 777, 779 (2001). If the Studio Directors are not found to be a Supervisor under Section 2(11), then the studio employees in particular have no supervisor. The record is devoid of evidence that anyone other than the Studio Directors have daily oversight over the studio employees. Indeed, the Board has found it persuasive support that a disputed individual is a supervisor where finding them not to be would leave the area without a supervisor. *Baby Watson Cheesecake, Inc.*, 320 NLRB 779, 784 (1996).

Further, without a finding that the Studio Directors, Operations Manager, and Development Director are supervisors, there are zero supervisors currently at the Employer. When fully staffed with an Executive Director, there would only be one supervisor in the entire organization. Such a lopsided ratio weighs in favor of a finding of supervisor status.

b. The Studio Directors', Operations Manager's, and Development Director's rate of pay is substantially higher than that of the rest of the bargaining unit

Another background or secondary criterion supporting a finding of supervisory status is the substantial difference in pay between the Studio Directors, Development Director, and Operations Manager and the rest of the voting unit. *American Commercial Barge Line Co.*, 337 NLRB 1070, 1072 (2002); *North Shore Weeklies, Inc.*, 317 NLRB 1128 (1995); *Essbar Equipment Co.*, 315 NLRB 461, 466 (1994); *Grand Rx Drug Stores*, 193 NLRB 525 (1971). In addition, the

Studio Directors, Development Director, and Operations Manager earn a salary, while all but one member of the rest of the voting unit are compensated hourly. (ER EX 10, ER EX 17, Tr. 360). Finally, the Studio Directors, Development Director, and Operations Manager are eligible receive benefits, while the rest of the voting unit does not. (Tr. 555, 556, 648, 687, 900).

c. The Studio Directors are held out as supervisors

In addition to other considerations, the Board attaches significance to the fact that disputed individuals were held out as supervisors to employees by the employer. *Wolverine World Wide, Inc.*, 196 NLRB 410 (1972). The Studio Directors, Development Director, and the Operations Manager are all held out as supervisors. Since the departure of the Program Director, job descriptions for studio employees, which accompany offer letters, list the Studio Directors as the person to whom the studio employee reports. (See, e.g., ER EX 57, ER EX 126). The Studio Directors inform WAM Mentors that they are selected for the WAM Mentor program. (ER EX 49). They appear on organizational charts as the direct supervisors of the studio employees and WAM Mentors. (ER EX 7 and 8).

d. The Studio Directors have their own designated work spaces within their respective studios

Each studio has its own separate space, with its own equipment, show space, and working space for students. (Tr. 50). Each Studio Director has their own desk within their respective studio. (Tr. 51).

e. The Operations Manager continued to work along with the Executive Director, Program Director, and Communications Director while the remainder of the staff was laid off.

During the COVID pandemic, all employees were furloughed from about May 2020 until March or April 2021 (Tr. 310-313), with the exception of Executive Director, the Program Director, Communications Director, and Operations Manager. (ER EX 65; Tr. 176, 793).

f. The Operations Manager can access all personnel files.

As noted, the only person who currently has access to personnel files at the Employer is Gonzalez, and her access includes the personnel files of the former Co-Executive Directors and to all former Executive Directors' personnel files. (Tr. 177, 790). While Beach served as Interim Executive Director, she did not have direct access to personnel files. (ER EX 36; U EX 12; Tr. 177). If she needed a file, she would obtain the file from Gonzalez. (Tr. 177). Similarly, Board of Directors members do not have access to the personnel files and other employee documents. (U EX 12; Tr. 177, 1021). For purposes of this hearing, the Employer needed to subpoena certain needed documents from the Operations Manager, including:

- Personnel Files
- Evaluations
- Interview notes, which reflect or memorialize recommendations, requests, or decisions to hire individuals
- Offer letters
- Unemployment insurance documents
- Disciplines and documents which reflect or memorialize the decision to discipline individuals
- Job descriptions

(ER EX 68).

The personnel files are maintained by Gonzalez and are physically located in a filing cabinet behind her work area. (Tr. 900). In addition, in one email in the record Gonzalez stated that she had employee files at her house. (ER EX 92).

B. The Petitioned-For Studio Directors, Operations Manager, and Development Director Exercise Managerial Authority

In addition to meeting the statutory criteria under Section 2(11) for a supervisor within the meaning of the Act, the Studio Directors, Operations Manager, and Development Director are managerial employees, and must be excluded from the bargaining unit by Board policy. *NLRB v. Bell Aerospace*, 416 U.S. 267, 275 (1974).

The Supreme Court defines managerial employees as those who “formulate and effectuate management policies by expressing and making operative decisions of their employer.” *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). The Court has further clarified that an employee may only be excluded as managerial if he or she “represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.” *NLRB v. Yeshiva University*, 444 U.S. 672, 683 (1980). The evidence establishes that the Studio Directors, Operations Manager, and Development Director meet this criteria.

The Studio Directors have discretionary input into SAY Sí policy and direction on a broad level, by steering the curriculum and events that comprise the substance, direction, and output of SAY Sí. On a day-to-day level, the Studio Directors have discretionary input into the formulation and effectuation of policies which impact employees and students in the interest of the Employer. Similarly, the Operations Manager, in essence, created the human resources’ structure of SAY Sí. She negotiates and oversees insurance for the Employer. She participates in and contributes to consideration of personnel decisions, such as the process for terminations and pay increases. She has discretionary input into budgetary decisions and purchasing.

1. The Studio Directors’ and Development Director’s Job Descriptions Support a Finding of Managerial Status

The Studio Directors’ Job Descriptions support a finding that they are a manager. The job descriptions specifically enumerate managerial duties and responsibilities:

- Works with other program directors to ensure high standards, goals, and objectives in [their respective] program are set and met;
- Develops programmatic creative youth development curriculum and internal deadlines;
- Manages program’s staff including co-teaching artists, studio assistants, work-study/interns, volunteers and visiting artists. This may include participating in . . .goal-setting . . .
- Provide guidance and mentorship to program’s staff, liaisons, mentors and students including goal-setting, project management and supervisory support

(ER EX 9, ER EX 22, ER EX 29, ER EX 34; Tr. 71, 128-129, 150-151, 162).

The unrebutted testimony established that the job descriptions, as clarified, accurately reflect the Studio Directors' job duties. (Tr. 71, 128-129, 150-151, 162).

Similarly, the Development Director's job description supports a finding of managerial status. The Development Director's duties and responsibilities include:

- Creating and implementing comprehensive, strategic development. . .
- Execute grant strategy, proposals . . .

(ER EX 42).

2. The Studio Directors and Operations Manager Have Responsibility for Formulating and Implementing Policy Which They Exercise in the Interest of the Employer

The Studio Directors and Operations Manager directly participate in formulating and effectuating policy. When Beach updated the Policy Manual, the Studio Directors provided feedback, which she incorporated into the policies. (U EX 27; Tr. 105-106). In addition, the Studio Directors and the Operations Manager provided substantive feedback and edits to job descriptions which were adopted. When filling a Teaching Artist vacancy, Ortiz provided input which was adopted into the job description. (ER EX 123). The Operations Manager provided input into the Data and Development job description which was implemented. (ER EX 77). Zabala drafted the job description for the Journalism Studio Producer positions. (ER EX 94). Further, Perez created the WAM Mentor duties and agreement document, which was also edited and/or reviewed by Gonzalez, Perez, Zivadonivic, and Zabala. (ER EX 122a and 122b).

The Operations Manager has considerable discretion with regard to developing policies and procedures. She identified the need to partner with Insperity and facilitated the movement of HR functions to their HR systems. (ER EX 43b, ER EX 83; Tr. 844). The record establishes that she is the chief person from the Employer to identify appropriate insurance coverage, negotiate

insurance coverage, and ensure that appropriate coverages are in place. (ER EX 43b, ER EX 91, ER EX 99, Tr. 175-176). She participated in consideration of pay increases for employees with then-co-Executive Directors, and how to allocate budgeting of staff raises. (ER EX 95; Tr. 86). Gonzalez performs budget forecasting, including payroll forecasting. (ER EX 86, ER EX 87; Tr. 178, 836). Gonzalez worked with Perez on updating the WAM Mentor hiring process and updating WAM Mentor applications. (ER EX 73). Gonzalez worked with the Studio Directors and Amri to update WAM Mentor Duties and the Agreement document that WAM Mentors sign. (ER EX 122a). She also is involved in discussions of employee separations, and her input was sought on how to end employees' employment and creating processes for documenting separations. (ER EX 61, ER EX 92). She handles unemployment claims for the Employer. (Tr. 176).

In addition, pursuant to the Internal Accounting and Controls System Policy reviewed for input by the Studio Directors, the Operations Manager, in partnership with the Executive Director, is responsible for establishing and enforcing written procedures for the use of all open charge accounts and credit cards. (ER EX 27).

The Board has long held that developing and improving policies and procedures which impact on the Employer's business meets the standard for managerial status. *The Washington Post Co.*, 254 NLRB 168, 199 (1981).

In taking the above actions, the Studio Directors and Operations Manager are "formulat[ing] and effectuat[ing] management policies by expressing and making operative the decisions of [their] employer." *NLRB v. Yeshiva University*, supra at 682.

3. The Studio Directors Have Independent Discretion in Developing their Studio Programs' Curriculum and External Projects in the Interest of the Employer

As described above, the Studio Directors develop the curriculum and output of their respective studios, and the record establishes they have independent discretion in establishing their respective studio's curriculum as well as in securing external projects. In doing so, they are not constrained by any policies or directives, but possess the independent discretion to undertake these actions in the interest of the Employer.

The Studio Directors develop the curriculum, determine the program goals and skills the students will learn, plan the projects and methods utilized. (Tr. 284, 350). The Studio Directors develop the lesson plans, the resources required, and the personnel required to realize the projects through realization. (Tr. 64). The Studio Directors run their respective studios, budgeting for what they require in the studio, working with the Operations Manager to acquire the materials they need. They maintain a network of Visiting Artists who contribute involvement, they evaluate students' work, change courses when needed, and decide the date an exhibit will take place and who will participate. (Tr. 64-65). The Studio Directors are the ultimate decision makers in deciding which students are accepted into each respective studio, and are responsible for dismissing or removing students from the program. (ER 72; Tr. 159). In this respect, they are similar to faculty consistently found to be managerial in the higher education setting, in that they determine SAY Sí's educational and administrative policy. *NLRB v. Yeshiva University*, supra.

Further, the Studio Directors manage external projects on their own and in conjunction with the Executive Director or co-Executive Directors in the interest of the Employer. One example in the record, Zabala's recent podcast pilot project with Up Partnership, entailed Zabala hiring additional personnel to implement the project. (ER EX 107d, ER EX 107e, ER EX 112, ER

EX 94,, ER EX 126; Tr. 1049). Other projects that the Studio Directors developed include Perez's project with Methodist Healthcare System which resulted in a sculpture located at the San Antonio Airport. (Tr. 132). Perez and Zabala are also negotiating on behalf of the Employer to partner with the Blue Star Project, a 501(c)(3) with galleries for students to exhibit work. (Tr. 155, 160-161). Zivadinovic recently worked with external partner Luminaria. (ER EX 58, Tr. 391, 395-396, 444). The Studio Directors develop these projects, proposals, coordinate logistics, negotiate timing, work with students to accomplish the project objectives, hire personnel or visiting artists, if needed, and acquire additional funding. (Tr. 132, 134, 156, 1049).

4. The Studio Directors, the Operations Manager, and the Development Director Have Discretion in Budgeting, Scope of Work as It Relates to Studio and External Projects, and Purchasing

Studio Directors have authority to approve purchases for their department, and do so before seeking approval and funds from the Operations Manager. (ER EX 27). The Operations Manager approves purchases up to \$300, and manages petty cash, which is used to purchase items under \$25. (ER EX 27). The Operations Manager supervises all cash in a secure cabinet to which only she and the Executive Director have access. (ER EX 27). The Operations Manager, along with the Executive Director, Board President, and Board Treasurer, has a bank signature card. (ER EX 27).

Both the Studio Director and the Operations Manager have extensive input into formulating and allocating budgets. (ER EX 86, ER EX 87, ER EX 95, ER EX 107c, ER EX 107d, ER EX 107e, ER EX 112, U EX 93; Tr. 77, 178, 836, 1042). As noted above, the Operations Manager has discretion in budgeting, and has advised the Executive Director in how to allocate specific items within the budget. (ER EX 95). The Development Director identifies potential funding

sources for the Studio Directors when they identify that they need additional funding beyond their respective budgets. (Tr. 65).

C. If the Operations Manager is Found Not to Be A Manager, She Must be Excluded as a Confidential Employee

Although the above demonstrates the Operations Manager's supervisory and managerial status, if Gonzalez is found not to be a supervisor or manager, she would be a confidential employee, and thus, must be excluded from the voting unit. The Board employs a "labor nexus test" to determine whether a worker is a confidential employee. In *BF Goodrich Co.*, 115 NLRB 722, 724 (1956), the Board held that, "... only those employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations" constitute confidential employees. Under Board policy, confidential employees are excluded from a bargaining unit with other employees. See *Ladish Co.*, 178 NLRB 90 (1969).

Employees who have regular access to confidential information concerning anticipated changes that may result from collective-bargaining negotiations are deemed confidential employees. *Pullman Standard Division of Pullman, Inc.*, 214 NLRB 762, 762-763 (1974) (employees found confidential where they calculated labor expenses as their inclusion prejudiced bargaining strategy in any future negotiations). The record overwhelmingly establishes that the Operations Manager participates in formulating this type of information for the Executive Director(s) to whom she reports. In this respect, she negotiates insurance rates and coverages on behalf of the Employer, participates in payroll forecasting, and provided projections for a recent pay raise. She also resolves grievances for employees. (ER EX 43b, ER EX 86, ER EX 87, ER EX 91, ER EX 99, Tr. 175-176, 178, 836). Under these circumstances, if she is not found to be a supervisory or managerial employee, she must be excluded as a confidential employee.

D. The WAM Mentors are Temporary Employees Who Do Not Share a Community of Interest with the Voting Union

The record establishes that WAM Mentors are, and are intended to be, high school students. (ER EX 17, ER EX 47; ER EX 122a). As such, they are temporary employees with a fixed term of employment with the Employer, which expires upon graduation. At that time, if they wish, they may apply to become ABC Instructors at SAY Sí. (Tr. 957). To the extent WAM Mentors, such as James Lee, were permitted to remain in their positions beyond the WAM Mentor graduation ceremony in the summer, this was permitted by the Studio Directors, in contravention with the stated policy of the WAM Mentor program.

The Board has held that temporary employees are properly excluded from a voting unit where they do not share a community of interest with permanent employees. The test for determining the eligibility of individuals designated as temporary employees is whether they have an uncertain tenure. *Marian Medical Center*, 339 NLRB 127 (2003). This test does not require a party contesting an employee's eligibility to prove that the employee's tenure was certain to expire on an exact calendar date. Rather, the Board examines whether or not the employee's tenure is finite and its end is reasonably ascertainable, either by reference to a calendar date, or the completion of a specific job or event, or the satisfaction of the condition or contingency by which the temporary employment was created. *Catholic Healthcare West Southern California*, 339 NLRB 127 (2003). A temporary employee hired for a finite, ascertainable term likely will not have a community of interest with unit employees sufficient to qualify him to vote. *Id.* This is true, even if circumstances result in extending the temporary employee's tenure. *Id.*, citing *St. Thomas-St. John Cable TV*, 309 NLRB 712 (1992).

Here, although Petitioner asserts Lundquist worked simultaneously as a WAM Mentor and an ABC Instructor for years, there is no documentation to establish this assertion, other than the

chart crafted from data provided by Gonzalez, at which time, Lundquist was an ABC Instructor performing WAM Mentor duties after their anticipated contract was cancelled, and while they waited for their contract with Stafford Elementary Visual & Performing Arts to be finalized. (ER EX 120; Tr. 155, 988). Further, Lundquist's pay rate as reflected in the chart is \$15.00, not the \$12.50/hour WAM Mentors earn, which mitigates against concluding they were classified as a WAM Mentor. Finally, to the extent they are viewed as a WAM Mentor, there is certainly an event (the finalization of the contract with Stafford Elementary Visual & Performing Arts contract) in the near future which will end Lundquist's temporary performance of WAM Mentor duties which began in August 2022. Accordingly, the weight of evidence establishes that Lundquist is an ABC Instructor temporarily performing WAM Mentor duties, and they should be classified as an ABC Instructor. Further, even if they are found to be a WAM Mentor, they are a temporary WAM Mentor since their term of employment as a WAM Mentor is finite and ascertainable, and their tenure as a WAM Mentor will end upon an event certain.

With regard to Lee, and while not substantiated in the record, Mason, to the extent they are also no longer high school students, they were permitted by Studio Directors to work as WAM Mentors only after the departure of the co-Executive Directors and without the knowledge of Beach. Accordingly, this would be an alteration of the intent of the WAM Mentor program. The intention of the program was for their tenure to end.

For these reasons, the WAM Mentors are temporary employees without a shared community of interest with the voting unit, and should be excluded from the unit.⁴⁶

⁴⁶ As set forth above, the WAM Mentors are also irregular part-time employees under the *Davison-Paxon Co.* eligibility formula.

E. The *Davison-Paxon* Formula is Appropriate, Calculated for the Quarter Preceding the Hearing Date, Rather than the Eligibility Date

For purposes of determining eligibility, use of the Board's standard formula set forth in *Davison-Paxon Co.*, 185 NLRB 21, 23-24 (1970) is appropriate here; however, the quarter preceding the hearing date rather than the eligibility date should be used to prevent "unit packing." *General Wood Preservative Co.*, 288 NLRB 956 (1988).

IV. CONCLUSION

The Employer's Studio Directors, Operations Manager, and Development Director hire and effectively recommend, effectively recommend reward and termination through their participation in the evaluation process, possess the authority to discipline, assign work and effectively recommend the assignment of work, responsibly direct work, and adjust grievances. In addition, they are managers under Board policy because they are responsible for formulating and implementing policy which they exercise in the interest of the Employer, they possess independent discretion in development their respective studios' curricula and external projects. They have discretion in budgeting, scope of work as it relates to studio and external projects, and purchasing. Further, although the evidence establishes the Operations Manager's supervisory and managerial status, in the event she is not found to be a supervisor or manager, she is a confidential employee under Board policy.

Finally, the WAM Mentors are temporary employees in a program limited to high school students, with a finite and ascertainable end date to their employment term. Accordingly, they do not share a community of interest with the voting unit.

For these reasons, and as set forth above, the Studio Directors, Operations Manager, the Development Director, and the WAM Mentors must be excluded from the voting unit.

Respectfully submitted,

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Attorney for SAY Sí

Dated: December 7, 2022

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of December 2022 the **EMPLOYER'S POST-HEARING BRIEF** was filed electronically and service copies sent via electronic mail to:

Jacob Simon Aronowitz
info@upounion.org

/s/ Darlene Haas Awada _____
Darlene Haas Awada

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16**

SAY SÍ (SAN ANTONIO YOUTH YES)
Employer,

And

Case 16-RC-304654

UNITED PROFESSIONAL ORGANIZERS
Petitioner.

PETITIONER’S POST-HEARING BRIEF IN SUPPORT OF BARGAINING UNIT

Petitioner United Professional Organizers (the “Union” or “Petitioner”) files the following Post-Hearing Brief in Support of the following proposed bargaining unit:

Included: All Teaching Artists, ABC Instructors, Studio Directors, Instructors, Studio Assistants, Mentors, and all Administrative Support Staff, including Operations Managers, Development Directors, Data and Development Associates, Marketing Specialists, Administrative Assistants to Programs employed by SAY Sí at its facility currently located at 1310 South Brazos Street, San Antonio, Texas.

Excluded: All other employees, including office clerical employees, professional employees, guards, and supervisors as defined by the Act.

Employer SAY Sí (the “Employer” or “Respondent”) has filed a Statement of Position objecting to the proposed bargaining unit, alleging that Program Directors, the Operations Manager, and the Development Director are all supervisory or management employees excluded under the Act.¹ During the hearing, Respondent also appeared to object to the Operations Manager’s inclusion in the bargaining unit under the confidential employee exclusion and to WAM Mentors under the temporary employee exclusion.

¹ Respondent’s Statement of Position also attempted to exclude WAM Mentors because, Respondent stated, Mentors “are high school students (not paid staff).” After this allegation was quickly disproven at the Hearing, it appears that Respondent has withdrawn this objection. If, however, Respondent raises this objection again in its own Post-Hearing Brief, Petitioner requests the right to address this objection.

I. STATEMENT OF FACTS

Founded in 1994, San Antonio Youth Yes, known as SAY Sí, is a youth arts education nonprofit in San Antonio, TX primarily providing after-school arts education programming for middle and high school students. The staff at the organization are seeking representation with United Professional Organizers for a number of reasons, including competitive pay, health insurance benefits for part-time staff, a negotiated pathway for part-time workers to become full-time, appropriate staffing and capacity-building, transparency in the decision-making of SAY Sí's Board of Directors and other goals associated with collective bargaining.

SAY Sí has recently experienced unprecedented upheaval & dysfunction, involving the untimely departure of supervisors termed the Co-Executive Directors over disputes with the Board of Directors, its Executive Committee, and the leadership of 'sister organization' VamosAbrazos, a nonprofit organization set up by SAY Sí's board in March 8th, 2022, in order to help the organization qualify for New Market Tax Credits and potentially other programs. Since its inception, financial & organizational murkiness have surrounded VamosAbrazos and its dealings with SAY Sí, prompting questions from then-Co-Executive Directors Nicole Amri & Stephen Garza-Guzman as well as some members of the Board of Directors itself. The Executive Committee, composed of Board President Jason Moran, Secretary Claudia Guerra, Treasurer Ana Cude, and the organization's founder Michael Schroeder, could not or would not address their questions and concerns sufficiently, resulting in the sudden departures of Amri & Garza-Guzman in August 2022.

Shortly thereafter and in probable connection, the San Antonio Independent School District failed to ratify an already-negotiated contract for arts programming with SAY Si, dealing another heavy blow to the organization & jeopardizing the employment of at least two workers

(PetEx 31 & testimony). The Board & Executive Committee struggled and continues to struggle to recruit and retain new supervision in the form of an Executive Director and/or Co-Executive Directors, and so they asked former board member Mary Ann Beach to take on the role of Interim Executive Director. Beach served as official Interim Executive Director from August 10 to October 7, 2022. Her term has now expired but as her testimony indicated, she still remains more or less in the role on an ad hoc hourly basis, codified in a contract separate from her now-expired Interim Executive Direction agreement. At the time of this writing, SAY Sí is still conducting its search for a new permanent Executive Director. This is the general context in which workers at SAY Sí undertook concerted activity to form a union & sought representation from United Professional Organizers.

Crucially, the duties of certain members of the bargaining unit whose eligibility management now contests, specifically the Operations Manager, MAS Studio Director, VA Studio Director, HIVE Studio Director, ALAS Studio Director, and Development Director, have had to expand extemporaneously & temporarily in the absence of the supervision typically provided by Executive Direction per testimony & the organization's own Policies & Procedures (PetEx27). As we will show in argument below, this cannot rise to the level of Substitution for Supervisor because the receipt & discharge of these duties does not occur on a frequent or chronic basis, but has rather followed from the exigent & unprecedented circumstances described in detail above. Testimony consistently corroborates this state of affairs, and so does the evidence. For example, in PetEx20, we see board president Moran explicitly instruct all staff to defer directly to him & the Board during the transition period. The letters of hire for Solstiz Campos & Katie Hughes (Pet's Exhibits 4 and 23) demonstrate clearly that the interim Exec. Director Beach retained sole, final authority on hiring even after the departures of Amri &

Garza-Guzman. The most consistent trend in both evidence and testimony is that these 6 workers lack the capacity to discharge the 12 indicia of management on a basis of independent judgment because all decisions were finally made by those serving as Executive Director, Co-Executive Director, and/or Interim Executive Director, and in certain cases, the Board of Directors itself. Significant decisions had to be painstakingly cleared with one if not more Executives as the exhibited email exchanges display in great detail. This practice is in keeping with the Policies & Procedures as well as the Bylaws also exhibited, and these rules along with pertinent federal & state regulations, especially those discussed in testimony concerning child welfare, govern & bound the behavior of all staff, and in many cases, volunteers, board members, and anyone on the premises. Taken together, the final & authoritative decision-making power of the executives & the rigid, interlocking rule systems in effect at the organization completely subsume the prospect of Independent Judgment in the discharge of any duties by the 6 workers alleged to be managers and/or supervisors and/or confidential employees by Employer. To take a closer look at the facts surrounding each contested worker's situation, we'll now review our witnesses and exhibits pertinent to their testimony.

Amalia Ortiz serves as the ALAS Studio Director and was called to testify with respect to that capacity and her experience at SAY Si. The record contains extensive discussion of Pet's Exhibits 16, 17, and 18 which illustrated her 11 month-long wait for a co-teacher to be hired into her studio. To recap, ALAS Co-Teacher Jules Vaquera leaves her position at SAY Si in January of 2021 (PetEx16); In September 2021, Ortiz pleads passionately with then-Co-Exec. Directors Amri & Garza-Guzman to hire someone so she's no longer working alone (PetEx17). In November of 2021, Ortiz again pleads with Amri to proceed with hiring any of the several candidates that had made their way partly through Amri's lengthy gauntlet of interviews and

tryouts; when the applicants ask for updates on their prospects from Ortiz, she can't provide them because she lacks the capacity to execute the hiring process, much less make the decision on hiring, and writes to Amri, " Please let me know what the plan is moving forward. I cannot even begin to explain what is going on because I don't even understand it." (PetEx18). Ortiz testifies that her best friend was in the hospital with terminal illness by October of 2021, and that she needed a co-teacher in her studio in order to take time off to spend with said friend before their inevitable & untimely passing. Ortiz further states that a third applicant, Gio, enters the pool of applicants for the ALAS co-teaching position alongside those referenced in the exhibits, Holly & Danysha. Ortiz makes it clear that she would just like anybody at this point but does suggest Gio. Her suggestion is summarily discarded by Amri, who finally hires Holly into the role in late November of 2021, a whopping eleven months after Ortiz requested a replacement for Vaquera be hired, and sadly, after the death of her own best friend in hospital. Simply put, if Ortiz and the other Studio directors possessed the capacity to hire workers or effectively recommend such, it would not have taken eleven months and the death of her best friend for Ortiz to get a new co-teacher into the ALAS studio. Ortiz further testifies that she has never executed any of the 12 indica of supervision, with specific questions as well as additional questions in reference to investigation and/or enforcement of SAY Si Policies & Procedures (PetEx27), again responding in the negative. This testimony is extensively corroborated by ALAS co-worker Katie Hughes in her own testimony, as she likewise states that she has not experienced any of the 12 indica from any of the contested staff under specific questioning. Both ALAS workers spoke to the collaborative nature of project conception and task assignment within the studio, in keeping with the culture as well as documented policy of SAY Si.

Ashley Perez serves as the Visual Arts Studio Director & testified as well. Like Ortiz & Hughes above, she testifies that she collaborates with her co-teacher Michael Foerster on creating curriculum for the middle and high school visual arts programs. She described various administrative tasks but stated that she spends most of her work time prepping for class or in studio teaching; she and Foerster testified that they do largely the same work. As is the case for all of these similarly-contested workers, Employer's best exhibited examples of Perez' purported supervisory or managerial authority are undercut by her submission to the real supervision of Executive Director(s), or by her input being of a similar suggestive caliber as any studio worker, and often both. For example, Employer tried to suggest through exhibits & lines of questioning that only Studio Directors can negotiate & contract with Visiting Artists to their respective studios, but Pet's Exhibits 42 - 45 introduced through Perez' own Visual Arts Co-Teacher Foerster contradict these notions in spectacular fashion: uncontested non-manager/supervisor Foerster is able to bring on at least 3 different Visiting Artists. And he's able to do this because he, like everyone else, must comport strictly with protocols established by the Executive Directors, like the well-known rate of \$25 per hour for Visiting Artist work. Employer attempts to present their Exhibit 73 as evidence that Studio Directors like Perez determine rates of pay for supposed subordinates like WAM Mentors, but replete testimony contradicts this: the desire for better pay equity for WAM Mentors was a widely felt demand, discussed among staff & reiterated at meetings to actual managers like the Executive Directors and so on. This collective advocacy was much more like concerted activity than supervision or managerial decision-making. Another example of Employer's failed efforts to paint Studio Directors like Perez as manager/supervisors is the issue of WAM Mentor Dismissals. The testimony from multiple witnesses is that this task can be & is carried out by many workers, contested and

uncontested, alike in a routine & clerical fashion because it does & must adhere to strict protocols around attendance & conduct pre-determined by Executive Directors, with no independent judgment necessary. The ultimate corroboration of this account of the issue is Pet's Ex. 89, a dismissal letter issued from uncontested worker Angelina Flores. Like Ortiz & Hughes, both the contested Perez & uncontested Foerster testified about the dispensation of the 12 indica of management in the Visual Arts Studio; Perez testified that she had not laid off, recalled, fired, hired, promoted, etc. other workers and Foerster corroborates by testifying that he, like Hughes above, has not been subject to the 12 indica at the hands of contested staff. In the same line of questioning, Perez testifies that she has not conducted investigations or meted out discipline under the various pertinent sections of the Policies & Procedures.

HIVE Studio Director **Stevan Zivadinovic** testified to the nature of collaboration in the HIVE New Media Studio and how decision-making with regards to programming takes place. Staff in the studio take initiative on different aspects of projects based on skills, availability and capacity. Sharing a representative week of volunteering from different studios during the pandemic furloughs, he explained how calendars are made and used at SAY Sí and how schedules for programming are settled on: workers submit their own hours & Executive Director(s) retains final authority on acceptance as well as hour adjustments, as corroborated repeatedly in testimony & Pet's Ex. 6 Worker Generated Schedule, as well as Pet's Ex. 34-36 & 61-65, which are both sets of hours adjustments from uncontested workers conducted not with the Studio Directors but rather with the actual supervisor, the Executive Director. Stevan went on to explain how the HIVE Mentor schedule is used by staff and mentors to communicate need, capacity and availability and equitably distribute the available mentoring sessions between the mentors. As with all Studio Directors, he testifies to his capacity, or lack thereof, to discharge the

12 indica, answering the negative. Likewise, he's questioned specifically about the pertinent sections of the Policies & Procedures, confirming he had never exercised described supervisory functions and underlined the outlined practice of clearing all significant action with the Executive Director(s).

HIVE New Media Studio Assistant Emmanuelle Maher's testimony, albeit brief, provided insight into organizational procedures pertaining to hiring and curriculum building, and corroborated testimony from Zivadinovic that these processes were collaborative & based on consensus, rather than the artifacts of his singular will as Studio Director. Holding several positions within SAY Sí, Maher authenticated several pieces of evidence (Pet's Ex. 60-65) and answered timeline-related questions. Pet's Ex. 60 shows Maher was hired by Amri not Zivadinovic to their initial New Media Intern position, while 61-65 clearly demonstrate that hours adjustment are made not by Studio Directors like Zivadinovic but instead by Program & Executive Directors like Amri et al. With respect to our Ex. 60, Maher testifies that Amri— then acting as Program Director— was the designated contact per the SAY Sí website, essentially serving as the first gatekeeper to employment. Indeed, Maher testifies that both of their paid positions (i.e., ABC instructor and later, New Media Studio Assistant) were offered by Nicole. The documents describing these job offers were hand-given to Maher. Regarding their position as New Media Student Assistant, Studio Director Stevan Živadinović did not actively participate in the hiring process. As mentioned above, Maher also discussed the procedural dynamic within the HIVE New Media Studio. They described curriculum-building as collaborative and largely contingent on the skillsets of the studio's teaching artists. Maher explained that the interdisciplinary nature of New Media breeds tentativeness in terms of job duties amongst them and their co-teachers. Meaning, project spearheading is determined by expertise, and that

Živadinović's director designation does not exempt him from falling into a more supportive role. Additionally, Maher explained that delivery of curriculum is also tentative, and that course-correction is a regular result of check-ins between Maher, Živadinović, and co-teacher R Miguel Salazar, as opposed to the solely-wielded power to direct & assign the Employer accuses Zivadinovic of having when he doesn't. Due to the temporal overlap in their various positions, further clarification was sought during cross-examination. Maher explains that they still continued to intern onsite despite being hired on as an ABC instructor. This was due to the fact that the latter dealt exclusively with off-site community partnerships (namely, SAY Sí's teaching contract with SAISD). Maher then explains that their internship ended once Amri sent them the job offer to become a Studio Assistant. The Studio Assistant position did not directly conflict with their position within ABC, so Maher held both positions for a short time.

Operations Manager **Anahí González** testified extensively, as her eligibility is challenged on the grounds of confidential employee status as well as supervisor/manager exclusion. Anahí was asked about her job responsibilities and shared her specific duties involving bookkeeping, processing payroll, event support & logistics, grant reporting support and record maintenance. González acknowledged that her direct supervisors were the Co-Executive Directors. González was asked about her supervisors' duties regarding labor relations and explained that within the normal course of business, when the position of Executive Director/ Co-Ex Director is filled, they are in charge of completing staff evaluations/assessments, salary negotiations and handling grievances for the entire organization. González was questioned about the type of confidential materials she has handled in the past and stated that the confidential materials she has handled in the past have been job offers; staff evaluation/assessments; employee compensation packages, promotions, corrective action plans, and grievances. González testifies that she has never

handled minutes of meetings where bargaining strategy is discussed. González explained that while she is privy to a lot of information, she is not responsible for making decisions on that information and does not make operations decisions about how the organization is run, nor is she even privy to the executive sessions of the board nor its executive committee. González was asked about how she comes in contact with these confidential materials and expressed that typically, these documents are either emailed to her, she is provided a physical copy of a document or she receives information verbally.

González stated that she is not typically present during management meetings regarding labor relations and does not participate in preparation for bargaining sessions or discussion of grievances. González was asked about where said confidential materials are stored. She stated that confidential material such as staff evaluation/assessments; employee compensation packages, promotions, corrective action plans, and grievances are maintained in personnel files under lock and key. Her testimony is that typically, the Co-Executive Directors and/or Executive Director and/or Interim Executive Director and Operations Manager have access to this. Email exchanges in evidence from both parties demonstrate that González consistently seeks approval from leadership for all things involving operations including payroll processing, purchasing and insurance (examples include Pet's Ex 10 and 51). Critically, Pet's Ex 87 and 88, the recent 990 tax forms for SAY Si, show that while some information handled by Gonzalez could be construed as having a labor nexus, the information most likely to be in nexus is not at all confidential in the first place. The finances, including revenues, compensation, and other budget line items, are all public information as a matter of law due to the organization's nonprofit tax status & regular compliance with federal and state regulation thereof. Testimony confirms that a wide array of contested, uncontested, and executive-level staff had access to the information

Employer asserts is confidential & exclusionary of Gonzalez from bargaining, because the most pertinent information was publicly available & widely discussed. Both parties stipulated Gonzalez has no subordinates whatsoever and Employer provided virtually no argument or evidence to the contention that she's a manager/supervisor. Nevertheless, she was questioned in the same manner as the Studio Directors as to whether she discharges the 12 indicia of management with respect to other workers at SAY Si and unsurprisingly answered to all in the negative.

During her first testimony, Media Arts Director **Guillermina “Gisha” Zabala** was asked to explain the hiring process of teaching artist Alex Ramirez. She was presented with Pet's exhibit 15 which shows a series of email exchanges between Nicole Amri, Program Director at that time in 2018, and Gisha Zabala. Zabala confirmed the information contained in the emails which state Nicole Amri posted the job description, contacted candidates, set up interviews, and made the final hiring decision alongside Executive Director Jon Hinojosa. As with all Studio Directors in similar hiring situations, Zabala had suggestive input along with other stakeholders including students and other workers. Exemplifying this, Zabala explained that during the hiring process she was invited to be part of the job interview, was asked to set up an artist talk with the finalists, was asked to share a survey on applicant performance with students, and was asked to share her final suggestions. Zabala & the other Studio Directors have a similar level of merely suggestive input on the hiring of their co-workers as the students they all teach, clearly failing to clear the bar of Effective Recommendation.

As with the other Studio Directors, Zabala responded to a series of questions related to the SAY Si Policy and Procedures manual, including drug-free SAY Sí, Sexual Harassment, and student communications, among others, answering in the negative as to whether she's

investigated and/or disciplined co-workers under the auspices of these policies. And likewise, Zabala answered in the negative when questioned about her capacity or lack thereof to discharge the 12 indica. During cross-examination, the Employer's representative asked Zabala about the hiring and training process for the WAM mentors. Zabala explained that studio directors and teaching artists receive and review applications from potential candidates. Then, those applicants go through a try out period where everyone in the studio, including uncontested workers, current mentors & students, observe them and write down evaluations.

During recall testimony, Zabala was asked to clarify information brought by the employer's representative regarding the UP Partnership grant and Journalism team. Zabala explained that this project is a temporary commission that is not part of the Media Arts program. Co-executive directors Amri and Guzman set up this project and asked Zabala to suggest SAY Si alumni to be part of the journalism team and to gather vendor quotes for a budget the Co-Executive Directors would authorize based on the grant money that was available. Both the budget and the alumni who will be part of the program have to be approved by the co-executive directors before Zabala could move forward with this project.

Next, we come to the testimony of Alex Ramirez, Media Arts Teaching Artist/ Instructor. Like all of his uncontested compatriots, Ramirez corroborates the testimony of Zabala insofar as he testifies that he has never experienced the discharge of the 12 indica of management by a studio director. We introduce through Ramirez Pet's Ex. 34-36, all of which are clear examples of hours adjustment conducted not with Studio Director Zabala but with Executive Directors, mostly Amri, just as Maher's introduced exhibits demonstrated. Ramirez also brings us the introduction of Pet's Ex. 49, one of the most pivotal and interesting exhibits in this case. This is one of if not the only example of an actual disciplinary proceeding at SAY Si produced in

exhibited evidence by either side. In this email exchange, Ramirez is rebuked by Amri & Garza-Guzman, and then summarily called into a disciplinary meeting. His misdoing was attempting to stay at work premises after hours with a student without having provided the proper notice nor receiving the corresponding permission to proceed. Because SAY Si is involved in childcare and a minor student was at issue in this instance, this situation was considered quite serious, moreso than might appear to someone outside looking in. As the exhibit shows, Zabala was also looped in & required to attend. We might be tempted to assume that the purpose of this was for Amri & Garza-Guzman to instrumentalize Zabala in the discipline of Ramirez, who works in the studio that she directs. But in the proceeding itself, something altogether different & very interesting happens instead: both Ramirez & Zabala testify that Zabala took Ramirez's side, advocating for him & in his interest for a simple verbal correction, as opposed to a formal written reprimand and/or other consequences under consideration by Amri & Garza-Guzman. This is actually in keeping with the Policies & Procedures of SAY Si. Unlike many places of employment generally but alike to many socially-conscious nonprofits, SAY Si has implemented restorative practices into its Policies and Procedures, especially those dealing with grievances and discipline. Restorative practices of conflict mediation and resolution are intended to be an alternative to the traditional retributive system of disciplinary punishment. A much greater emphasis is placed on the employee's understanding why their incorrect actions caused harm to others in the workplace and/or community, and the proactive steps they must take to repair the harm done & accept accountability from their peers. In practice, this means that almost all first & minor offenses under the Policies and Procedures are to be handled with a series of meetings & the development of a Corrective Action Plan for those found to have done wrong. Because these meetings, plans, the steps of the plan, and other mediating processes of the

Restorative System stave off much more onerous consequences like suspension and termination for wrongdoing workers, their conception & imposition by Studio Directors should be construed as in the employee's interest, as much if not moreso than the employers. In other words, the duly-adhered-to Policies & Procedures of SAY Si entail that Studio Directors act not in the interest of the employer but rather the employee if and when they interface with the disciplinary process at all. The Policies and Procedures nonetheless make it crystal clear that Executive Directors are those possessing final disciplinary authority over all staff. In the only cleanly documented & attested-to instance of an actual disciplinary proceeding at SAY Si, we find a Studio Director acting in the best interest of a co-worker rather than their mutual employer, in proper accord with the organization's Policies & Procedures.

Finally, WAM Mentors Reese Lundquist and James Lee both testified. Their testimony was that their positions as WAM Mentors had no terminal date upon hire, and this crucial fact is corroborated by the lack of such dates on Pet's Ex 95 and 96, the WAM Mentor Applications of Lee himself and that of newly-hired WAM Mentor Mia Perez, which is evidently the most recent such application. Both also testified that their positions as WAM Mentors extended past their time in high school, the supposed terminus posited by management even in absence of any documentation in the hiring materials for the positions at issue. Furthermore, Lundquist was directed by Beach & member(s) of the board during their transition period between roles after the non-ratification of SAY Si's contract with SAISD, shown in Pet's Ex. 94.

II. STANDARD OF REVIEW

The party seeking to exclude employees from a bargaining unit has the burden of proving each statutory exclusion. *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 711, 121 S. Ct. 1861, 1866 (2001); *George Mee Memorial Hospital*, 348 NLRB 327, 333 (2006). Here, the Respondent

bears the burden of proof on each attempted exclusion. Any lack of evidence is construed against the party asserting a statutory exclusion. *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 n.8 (1999). Purely conclusory evidence is insufficient to establish a statutory exclusion. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006).

III. LEGAL AUTHORITIES AND ANALYSIS

A. The Bargaining Unit Contains No Supervisory Employees As Defined By The Act .

The definition of supervisory employee is construed narrowly to avoid improperly denying employees of their substantial statutory rights. *Curtis Industries*, 218 NLRB 1447, 1448 (1975).

Section 2(11), of the Act defines “supervisor” as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11). The Supreme Court has interpreted Section 2(11) as setting forth a three-part test:

Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,” and (3) their authority is held “in the interest of the employer.”

Kentucky River, 532 U.S. at 713 (quoting *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 573-74, 114 S. Ct. 1778, 128 L. Ed. 2d 586 (1994)). Respondent must also prove that the putative supervisors spent a “regular and substantial” portion of their work time performing these functions. *Oakwood Healthcare*, 348 N.L.R.B. at 694. Thus, “the Board . . . exercise[s] caution

not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intended to protect.” *Id.* at 688.

Respondent introduced no evidence that any of the putative supervisors had the authority to (1) hire, (2) transfer, (3) suspend, (4) lay off, (5) recall, (6) promote, (7) discharge, (8) assign, (9) reward, (10) discipline other employees, (11) responsibly to direct them, or (12) adjust their grievances. At most, Respondent attempted to show that the putative supervisors had the authority “effectively to recommend” one of the twelve indicia. In particular, Respondent appeared to focus on Studio Directors’ apparent ability to negotiate and contract with Visiting Artists to work in their studios. However, co-teachers, who are non-contested members of the proposed bargaining unit, perform the exact same work. This demonstrates that management does not consider this task to be supervisory. Moreover, both teachers and Studio Directors only perform these negotiations under the strict regulations approved by the Executive Director and the Board, which dictate the rate of pay and all other critical aspects of their work.

Respondent also pointed toward Studio Directors’ apparent input into the rate of pay for WAM Mentors. But the entire staff advocated together to increase WAM Mentors’ rate of pay. Studio Directors had no special role in this advocacy, and there is no evidence that their support of a pay increase was given any particular weight by management. Similarly, although Studio Directors have input into the hiring of teaching assistants and WAM Mentors, this input is not provided in the role of supervisor. Instead, students, teachers, uncontested employees, and mentors all participate in the hiring process in the same way and their input has equal weight. The job description, job posting, interviews, and final hiring decisions always remain the sole responsibility of the Executive Director.

Studio Director Amalia Ortiz’s testimony demonstrates that she and the other putative supervisors had no authority to effectively recommend one of the twelve indicia of supervisory status. When her studio coworker resigned in January 2021, she regularly begged the then-co-executive directors to hire a replacement. The co-EDs refused to even post the position until the summer, at which point Ms. Ortiz was desperate for assistance. She had no authority to post the job opening or do anything else, other than reach out to alumni for ad hoc assistance. When management finally posted the job opening in late summer 2021, Ms. Ortiz recommended that a certain applicant be hired but Ms. Amri overruled Ms. Ortiz’s request. If Ms. Ortiz had the authority to make her own hiring decisions, she would have hired a new coworker immediately. If Ms. Ortiz had the authority to *effectively recommend* hiring, at the very latest a replacement would have begun working in late summer 2021. Instead, management did not finally fill the job position until November 2021, a full eleven months after the vacancy first existed, despite Ms. Ortiz’s continued attempts to encourage a timely hire.

There is no evidence that Studio Directors, the Operations Manager, and the Development Director “responsibly direct” other employees. “[T]o establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” *In re Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 692 (2006). “*Oakwood* made clear that the putative supervisor must be potentially liable not only for his own failures, but also for the failures of his subordinates.” *Entergy Miss., Inc. v. NLRB*, 810 F.3d 287, 294 (5th Cir. 2015) (citing 348 N.L.R.B. at 692); *see also, e.g., In re Croft Metals, Inc.*, 348 N.L.R.B. 717, 722 (2006) (holding that movant showed accountability where

the “record reveals that the Employer has disciplined lead persons by issuing written warnings to them because of the failure of their crews to meet production goals or because of other shortcomings of their crews”). Respondent has cited no evidence that any putative supervisor was “potentially liable for the subordinates’ mistakes.” *Entergy Miss.*, 810 F.3d at 295.

There is also no evidence that the putative supervisors exercise independent judgment as defined by the Board. The NLRB held in *Oakwood* that, while “the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices,” “a judgment is not independent if it is dictated or controlled by detailed instructions.” *Oakwood*, 348 NLRB at 693. For example, a supervisor who determines which employee should do a particular job exercises independent judgment if that determination involves “a personal judgment based on personal experience, training, and ability,” but making the only obvious choice or assigning work solely to equalize workloads is “routine or clerical in nature and does not implicate independent judgment.” *Id.*

Accordingly, Respondent has failed to meet its burden that Studio Directors, the Operations Manager, and the Development Director are supervisory employees under applicable Board or court precedent.

B. The Bargaining Unit Contains No Managerial Employees As Defined By The Act .

The Act excludes managerial employees, defined as employees who “formulate and effectuate management policies by expressing and making operative the decisions of their employer” and “who have discretion in the performance of their jobs independent of their employer’s established policies.” *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 283, 288 (1974) (internal quotation marks omitted); *Case Corp.*, 304 NLRB 939, 948 (1991), *enfd.* 995 F.2d 700 (7th Cir. 1993). The definition of managerial employee is construed narrowly to avoid

improperly denying employees of their substantial statutory rights. *Curtis Industries*, 218 NLRB 1447, 1448 (1975).

Employee testimony demonstrated over and over that none of the contested employees formulate or effectuate management policies and none of them have the authority to use their discretion to deviate from established policies. Instead, the various Executive Directors and the Board have the sole authority to create policy and employees can only implement the policies as written. Accordingly, Respondent has failed to meet its burden that Program Directors, the Operations Manager, and the Development Director are managerial employees under applicable Board or court precedent.

C. The Bargaining Unit Contains No Confidential Employees As Defined By The Act .

Traditionally, the Board has used a “labor nexus test” to determine whether a worker is a confidential employee. In *BF Goodrich Co.*, 115 NLRB 722, 724 (1956), the Board held that, “. . . only those employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations” constitute confidential employees. It is well established that to be found to be a confidential employee there must be a “labor nexus.” The fact that an employee has access to nonlabor related matters, even though confidential, is “irrelevant to the determination of whether [a] secretary [is] a confidential employee.” *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 191–192 (1981).

The Operations Manager is not a confidential employee under the Board’s labor nexus test. First, Respondent introduced no evidence that the Operations Manager handled confidential information at all. Unlike with a privately held company, a not-for-profit corporation like

Respondent must post its tax filings publicly.² Respondent is also subject to Chapter 22 of the Texas Business Organizations Code and, in particular, Section 22.353, which requires Respondent to “make the records, books, and reports [of the corporation] available to the public for inspection and copying” Tex. Bus. Org. Code § 22.353(b). Testimony also revealed that Respondent’s Board Meetings are generally open to all staff and to the public at large. Although the Operations Manager may have access to some financial documents about Respondent, this information is not confidential in the first instance because the Board of Directors, the staff in general, and even the public may access financial records of Respondent.

Even if the Operations Manager did deal with confidential information, there is no labor nexus. There was no evidence offered that could establish that she acted in a confidential capacity to persons who formulated, determined, and effectuated management policies in the field of labor relations. She was not present during meetings where labor relations, employee grievances, or bargaining strategy was discussed and has no access to these issues.

The Regional Director should also give less weight to testimony reflecting that the Operations Managers’ job responsibilities have temporarily increased during the current change in leadership. Specifically, Respondent has no current executive leadership and Respondent’s Board has requested additional job duties from the Operations Manager since August 2022. However, the testimony demonstrates that as soon as the Board of Directors appoints a new executive director, the Operations Manager will immediately go back to her previous role, authority, and job duties. To exclude the Operations Manager, Respondent must prove that her increased job responsibilities were “both regular and substantial,” not sporadic and temporary.

² Respondent’s 2020 Form 990 can be found at https://apps.irs.gov/pub/epostcard/cor/742759456_202012_990_2021052118162409.pdf. The only information a searcher must know is the name of the organization, and at least five years of Form 990s are readily available online. Among other information, Form 990s list all contributions and grants, program service revenue, investment income, other revenue, salaries, employee benefits, and other expenses.

Hexacomb Corp., 313 NLRB 983 (1994); *see also GAF Corp. v. NLRB*, 524 F.2d 492, 496 (5th Cir. 1975) (finding that while employee's job duties temporarily included foreman responsibilities, "Reed had to know that to a substantial degree his interests lay with the rank-and-file workers with whom he would inevitably again be working."). This is true even if the Operations Manager's temporary duties are in place during the certification election. *Id.* ("Temporary supervisors, moreover, have been permitted to vote even though the election occurred while they were acting in a supervisory capacity.") (citing *Thermoid Company*, 123 NLRB 57, 58-59 (1959).

Accordingly, Respondent has failed to meet its burden that the Operations Manager is a confidential employee under applicable Board or court precedent.

D. The Bargaining Unit Contains No Temporary Employees As Defined By The Act .

Under Board law, the general test for determining the eligibility of individuals designated as temporary employees is whether they have an uncertain tenure. *Marian Medical Center*, 339 NLRB 127 (2003). If the tenure of the disputed individuals is indefinite and they are otherwise eligible, they are permitted to vote. *Personal Products Corp.*, 114 NLRB 959 (1955); *Lloyd A. Fry Roofing Co.*, 121 NLRB 1433 (1958); *United States Aluminum Corp.*, 305 NLRB 719 (1991); and *NLRB v. New England Lithographic Co.*, 589 F.2d 29 (1st Cir. 1978). On the other hand, where employees are employed for one job only, or for a set duration, or have no substantial expectancy of continued employment and are notified of this fact, and there have been no recalls, such employees are excluded as temporaries. *Indiana Bottled Gas Co.*, 128 NLRB 1441 fn. 4 (1960); *Owens-Corning Fiberglas Corp.*, 140 NLRB 1323 (1963); *Sealite, Inc.*, 125 NLRB 619 (1959); and *E. F. Drew & Co.*, 133 NLRB 155 (1961).

In *Boston Medical Center*, 330 NLRB 152 (1999), the Board considered the employer's contention that its house officers were temporary employees by virtue of the fact that they worked there for a set period of time—anywhere from 3 to 7 years depending on their particular residency program. The Board there clarified that it will not find individuals to be temporary employees simply because their employment will terminate on a date certain.

[T]he Board has never applied the term “temporary” to employees whose employment, albeit of finite duration, might last from 3 to 7 or more years, and we will not do so here. In many employment relationships, an employee may have a set tenure and, in that sense, may not have an indefinite departure date. Athletes who have 1, 2, or greater years' length employment contracts are, theoretically at least, employed for a limited time, unless their contracts are renewed; work at a legal aid office may be for a set 2-year period; a teaching assignment similarly may be on a contract basis. To extend the definition of “temporary employee” to such situations, however, would be to make what was intended to be a limited exception swallow the whole.

Id. at 166.

WAM Mentors are virtually identical to the house officers in Boston Medical Center. They remain in their positions throughout high school and even beyond, with no firm end date currently in place. Accordingly, Respondent has failed to meet its burden that WAM Mentors are temporary employees under applicable Board or court precedent.

E. No Supervisory Taint

At hearing, Employer's representative raised the specter of supervisory taint in this case. Even if it should be found that any of the contested employees in this case are manager/supervisors, Employer made no case nor offered any evidence that putative manager-supervisors offered reward or promotion to putative subordinates in exchange for the latter's participation in concerted activity, nor conversely that putative manager-supervisors threatened to punish or demote putative subordinates should they refuse to participate in concerted activity. The Board has long required that manager-supervisors engage in one or both

the above during a union organizing campaign; mere participation is not sufficient to meet the standard of Supervisory Taint. Moreover, no members of the prospective bargaining unit object to the membership in that unit of any of the contested workers, and none of them have joined in Employer's action to exclude workers, as characterized in the testimony.

IV. CONCLUSION

SAY Sí's mission is to "ignite[] the creative power of young people as forces of positive change. We value artists, empower marginalized communities and advance culture." Petitioner respectfully requests that the Board approve the following bargaining unit in support of the organization's mission:

All Teaching Artists, ABC Instructors, Studio Directors, Instructors, Studio Assistants, Mentors, and all Administrative Support Staff, including Operations Managers, Development Directors, Data and Development Associates, Marketing Specialists, Administrative Assistants to Programs employed by SAY Sí at its facility currently located at 1310 South Brazos Street, San Antonio, Texas.

RESPECTFULLY SUBMITTED,

UNITED PROFESSIONAL ORGANIZERS

By: s/s Jacob Aronowitz
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UNITED PROFESSIONAL ORGANIZERS
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Representative for Petitioner

CERTIFICATE OF SERVICE

I certify that on December 7th, 2022, a copy of the foregoing document was *Electronically Filed* on the NLRB's website <http://www.nlr.gov>. Also, I do hereby certify that a true and correct copy of the document has been served on the following individuals by email:

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